

JUSTICE UNDER LAW AND FOR
HUMANITARIANISM AS FOUNDATION OF
SOCIETY AND CHALLENGE OF
CIVILIZATION

*Being Volume Four of Some Legal Foundations of Society.
Understanding, Purpose and Conciliation As Means and
Ends of Positive Law and Representative Government.*

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BY
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Acknowledgments...

Planned to follow immediately the publication of the last volume on Conciliation, global wars have delayed the earlier completion of this treatise. The intervening years are momentous in the development of civilization, producing changes in fundamental thought and action as profound as in any decades since the Christ teachings followed pagan cultures and softened the power of authority in human affairs.

The writing continued during the entire interlude; and parts of some chapters first appeared as addresses or essays, although primarily intended for this treatise. Appreciation is expressed to the societies and institutions for the honor their invitations implied. Use is here made of excerpts from the following: *Communism under the Constitution* before the Bar Associations of Pennsylvania (1942 and 1943); *Some Principles and Changes of Constitutional Interpretation* before the Forum of Law and Politics of Germantown Academy (1944), which emphasized the absence of limitations on taxation for the general welfare; *Individual Liberty and Group Order* (1945) and *Lincoln, the Lawyer-Statesman* (1946) before civil groups at Wilmington, Delaware; *Justice under the Constitution and the United Nations* before the Camden County Bar Association, Camden, New Jersey (November, 1946) following the San Francisco Conference, wherein the peril of Russia's probable abuse of the veto was foretold.

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The full notes, citations, quotations and references contained and acknowledged in the preceding volumes of the series make repetition herein unnecessary.

...INTRODUCTION...

SOME LEGAL FOUNDATIONS OF SOCIETY was published seven years ago. The purpose of that treatise is to give a conception of government and law as determined by cosmic forces, and as molded to the uses of man by his creative mind. The underlying idea is to suggest a coalescence of the laws of nature and of man, which stem from the same evolutionary processes and result in similar uniformities of conduct in jurisprudence and of energy in nature.

The Foundations consist of three theses, in as many volumes, on UNDERSTANDING, PURPOSE and CONCILIATION as means of positive law and representative government; and the series as a whole constitutes an introduction to the study of human polity with psychological, sociological and economic approach to the ultimates of individual freedom and universal justice.

JUSTICE UNDER LAW AND FOR HUMANITARIANISM—this volume summarizes, supplements and applies a philosophy of life relations which the preceding volumes consider in outline. No endeavor is made to formulate an exhaustive philosophy of law; but the assumptions, reflections and convictions, it is hoped, of an unfettered mind are here given in an effort to rationalize the strivings of mankind and to give the understandings of universal justice to human wants and aspirations as the foundation challenge and creator of civilization.

The three prefatory volumes have been criticized for dialectical style, didactic in purpose and in scope idealistic. But if justice is the pragmatic ultimate of all mind processes, human conduct and world forces, then its reality as the dominant force in human affairs can be demonstrated only by the logic of rational premises and dogmatic teachings that assume both the graspings of animal survivals and the aspirations for the good. So mind impels action only when positive convictions supplant mere conclusions by the avowal of remedial ideas in such manner as to awaken free minds to the perils implicit in present world conditions.

I

THE PUBLICATION AT THIS INSTANT is impelled alone because catastrophic happenings in world affairs, basic changes in the political structures of governments and in the societal and economic aspects of civilization have induced this expression of convictions as the performance of a duty. This introduction should be prefaced by some short excerpts from the preceding volumes in order to give comprehensiveness to the philosophy of the whole treatise.

The opening and closing paragraphs of the introduction to the first volume—*UNDERSTANDING*—follow:

"This book gives consideration to the human mind as the creative force in the change of things, individuals, institutions and laws from lower to higher levels, with each emergent level retaining vestiges of the level from which it evolved. The assumption will be indulged of the purposive energies of nature as conceived by Dr. Erasmus Darwin and as contrasted with the chance determinism of his grandson, who made a world think in terms of change. Emphasis will be given to the animal nature of the human organism and to the dominance of the individual mind as a dynamic force in the determination of the goods and the satisfactions of human life. The approach will be the interests, purposes and strivings of mankind in all political, social, religious and economic relations in the development of human culture and the approximation or attainment of the ultimate destinations of individual good and of group welfare."

"The wonder of man's existence is his faith in himself. The transmutation of the elements into organism and its transformation by mind into man of highest intellectual development and moral worth is because his striving is eternal. Man broke his chains of instinct and became free of the regimentation of animal domination, when mind in its aspirations sweetened his work with faith in self-help for self-development."

"Whether ascending or descending, man continuously strives to overcome the animal aggressions of struggle by his search for a rule of conduct that is right and just because applicable to all. The principle of justice is without value unless it is enforceable by all against any one and by any one against all."

"Justice as concept is the highest level of mind development in all relations of life; and is the balance between individualism and collectivism. Democracy is government for the individual under self-imposed limitations, and dictatorship in government and communism in economy are the ends of Marxism. Experience has demonstrated the truth and error of these extremes."

"The demand now is for that justice which will not only give democracy to economy and efficiency to production, but also will humanize the conditions of labor, stabilize the work, meliorate the tasks and socialize the profits by just distribution among all the workers who strive with muscle or with mind."

"Understanding is the essence and meaning of all legal relations. A purposive striving attends all energy to attain higher levels of life; and cooperation, compromise and conciliation are the mental processes which define the means by which man through all time has struggled for individual self-mastery, group self-government and finally, has achieved justice under law.

"The reaching of this moral height does not, however, assure either the feasibility or the wisdom of attempting to compel the equitable distribution of the profits of industry by direct legislation. The instant solution would seem to lie in the utilization of every legislative incentive to induce employers, in the exercise of intelligent self-interest, voluntarily to measure the compensation of their workers by the 'just balances and just weights' of sharing profits."

The following excerpts express some basic ideas of the theme on PURPOSE of the second volume:

"This volume will fail in its purpose if it does not demonstrate the perilous implications of Charles Darwin's dogma of mechanistic determinism, which would make man the chance puppet of physical forces and the supine victim of pessimism and despondency * * * without any control over the energies that govern the relations or destination of his life."

"The search of the law is for some universal principle that will restore to balance the disturbed structures of society. * * * Voluntary concession is the attitude of mind with which all must approach * * * positive law and government."

"The vital issue that now divides mankind is the struggle between individualism and communism; and it will be solved either by the resurgence of animal selfishness and ultimate arbitrament of class war or by an enlightened self-interest in compromise, to the end that successive understandings shall keep in coordinated balance individual enterprise and communal welfare."

"Man makes his own future and molds his destination as an individual and as one of a group. His mind is the spirit of curiosity, knowledge and civilization. If it were not for these impulses which have driven him to know more of his nature, to master his body and to direct his aspirations, there would be neither religion, nor science, nor economy, nor government, the four great spheres of man's mental effort and physical work. The individual's choice of interests controls the development of his character, so the moral principles which govern group organization are their interests and the wants by them stimulated."

"Now, more than ever—when evolution, compromise and conciliation have supplanted the violence of revolution—the nature and uses of private property and the competitive system of capitalism are within the sole control of the purposes of individual electors and their representatives. It is through the power of the people's representatives over taxation, commerce and money that the present uses and ownership of property and the distribution of the profits of industry are regulated and defined for the security and welfare of all; and herein lie the most delicate and momentous functions of government and of law determinative of the destinations of the individual and the state."

CONCILIATION as a legal foundation of society, the third volume, emphasizes the contribution of mind as a creative and directive energy in the development of man and his institutions; and discloses the antitheses in conflict of individualism and statism and the complements of competition and cooperation in mutual aid as means to righteous ends. The excerpts following are from that thesis:

"There is one assumption that dominates all conflicts of ideas in antithesis—that human society is not determined alone by the blind forces of environment, amidst which man is impotent, but is directed by the wise and just purposes of his mind. It is from this assumption

the challenges that confront and often confound mankind stem—the challenges of cooperation, class, compromise and justice."

"The theory of Marxism has no place in the American tradition, which has abolished all classes as either of social or political power.

The characteristic of the American Revolution and of our Constitution is that reconciliation and not conflict is the fundamental of our civil liberties, which were never intended and never have been for a class, but are for all men—and this because the individual is the unit of our democracy."

"The great compromises in the past have been of political power, those of the present affect both economic and political power and the future great compromises may be envisaged as between the institution of private property and its uses in common, not so much through ownership as by a just initial division of the profits of industry in avoidance of subsequent equalization of distribution through the medium of taxation. The demand now is for that justice which will not only give democracy to economy and efficiency to production, but also will humanize the conditions of labor, meliorate tasks and socialize the profits by their just distribution among all the workers."

"The instant solution would seem to lie in the utilization of tax exemptions or credits or other legislative incentives to induce employers, in the exercise of the choice of intelligent self-interest, voluntarily to adopt some plan for the sharing of profits."

II

THE TIME IS NOW HERE when man must reflect on his dominant aspiration and ponder its dual nature as a reality in human affairs. For he is about to conclude the futility of the search for precise principles definitive solely of human development and devoid of any relation to the fundamental laws explanatory of the inter-actions of a basic energy in all motions and things. Atomic fission is the awful manifestation of this energy as a devastating physical force; and its highest level of vital structure is human life, which attains sublimity of expression in the purposive and understanding processes of the creative mind.

Certainly, the most persistent and probably the most egregious blunders of human thought and action have resulted from the effort of phil-

osophies of history to formulate divisive laws of societal organization and of individual conduct; which are intended to aid the detection of decadent trends in tribal or national cultures, and so to direct the coming event with the wisdom of a seer. All their books repeat the trite idea of maturity and death and of the rise and fall of civilization; which, however, but confounds the corruption and decay of the *cultures* of only segments of peoples in group association with the eternal progress of an always expanding and everlasting *civilization* of mankind as the universal society.

Until the Christ uttered the most profound of human teachings, human thought was without conception of the purposes or understandings of a dynamic mind or of its contributions to the development of every individual as a personality, as also of the institutions or instrumentalities of the successive cultures and governments in a never ending evolution of civilization. And too few have realized, since this divine lesson, the foundation fact of human destiny: *That the aspiration of the human mind for justice is the transforming force which has made him less the animal and more the free man, who strives ever for that goodness he conceives to be his due and, in oughtness, he eternally is obligated in equal measure to give to all.*

III

THIS IS THE TRIAL DAY of civilization with world society confronted with opposed ways of life and antithetical cultures which press universal justice for immediate acceptance as panaceas of mankind's ills. No mind can foresee with certainty the essential factors of the problem which civilization, after interludes of trial and error, will present for the pivotal judgments of humanity; but sensitive minds, detecting the murmurings of wrongs and discerning the intimations of the aspirations for justice, do sense the imminence of crises. It is when minds of prescience apprehend the challenges which confront and confound humanity, that theirs becomes the hard duty courageously to invoke the nation or the organization of nations to save the ideologies and institutions of their cultures and so to carry to higher heights the sacred things of global civilization.

With enlightened minds and the spirit of ennobling sacrifice, the free men of Western culture must now ponder the deep significance of the obvious but nonetheless momentous facts discussed in this treatise that compel instant decisive action. (1) Swung between the cultures of the East

and West hemispheres, America and England are civilization's destined monitors of individual freedom and universal justice. (2) Since the way is open in American polity for instant totalitarian communism, Marxism as a conspiracy of political violence here should be outlawed, since through violence it seeks world chaos. (3) Because justice should attend the distribution of the profits of industry and a flexible deferred compensation of profit sharing may supplement a rigid wage, the American statutory incentives of reciprocal employer and worker justice must become the dominant factors in the purpose of government to make real, in all collective bargaining, the achievement of intelligent self-interest over the violences and delusions of international communism. (4) Science has answered mankind's prayer, and civilization can now defend itself against the outlaw nation by and through a world tribunal with power to enforce its sanctions by atomic fission.

IV

MAN WAS BORN IN BONDAGE to his animal nature; and he eternally has been the victim of its tyranny. A martyr to its power, his effort has been to survive; but during the whole of his development his constant struggle, through mind discipline, has been to control his predatory brutish propensities. His innate desire for ease, however, impels him to cling to the old; and this conservatism more than resents change. It induces purposive strivings to restore the old comforts that had satisfied his wants.

It is out of these conflicts to master the animal tendencies and to restore a disturbed status, or to be compensated for its loss, that the desire for justice partakes of a creative aspiration; and the demand for its realization, as an inherent and dominant mental trait, persists until satisfied for a time—since the interaction between mind aspirations and animal instincts is a changing function.

Full restoration of status seldom, however, requites either individual or societal injustices. But this does not mean the wrongs of human behavior are not always equated in part, in some form and at some time.

"Justice must be done though the heavens fall," epitomizes the alphabet lesson of human experience and complements the most profound admonitory exhortation ever uttered for the humanitarianism that leads to the higher law of God. This inspired definition of the good is the quintessence of all human thought and action; as in actuality the appeal of

Micah—"to do justly * * * love mercy * * * and walk meekly with thy God"—illuminates the dome of the Library of the Congress of our nation, which ultimately must save for civilization freedom and justice—the eternal and now realizable aspirations of mankind.

V

SINCE PRIMITIVE MAN FIRST forceably crossed the cave threshold and violated the property or assaulted the person of his neighbor, the group has punished the outlaw individual or nation for crimes against the order, security and humanism of society; and governments of law have exacted expiatory or compensatory reparation for all wrongs done by and to individuals, groups or nations.

After subjection of the individual for seventy centuries or more to a government that enslaved, to an economy that riveted wrongs to the lowly and to religions that so dominated mind as to delay and often to thwart its aspirations for freedom—Christianity began to create in man new ideas of human and divine relations, Copernicus' conception of the universes and Newton's theory of energy slowly revolutionized human thought, the discovery of continents and circumnavigation of global oceans enlarged the vision and widened the scope of man's activity, the overthrow of feudalism and finally, only seconds ago in the story of man's aspiration for justice, the English and French agitations for political liberty and American Revolution gave to man a dignity in work that made him free to govern himself.

The achievement of this foundation purpose of all human strivings imposes on every individual who enjoys its rights and privileges the most sacred of everlasting obligations. He must now be just in governance and economy or he will perish among his new-born freedoms. For since all are now free to think, to act, to aspire and to have rights, every human being must give to his fellow that freedom, tolerance and justice which he seeks for himself; else in denial, he becomes an outlaw to be restrained, disciplined or punished by sanctions of the government he has ignored.

VI

THE INDIVIDUAL'S ACHIEVEMENT of personal freedom and his realization of the attendant duty of justice marks the present as the most momentous period in the history of mankind. Ancient loyalties of groups and basic ideologies affecting human interests are now in transition. The boundaries

of nations, ways of life, kinds of government and faiths of religion of all human associations world-wide are changing as peoples in reason mold actions or, under sanctions of the power of arms, in war determine mankind's destiny.

All nations and groups are now engaged in a re-examination of the foundations of society. Whatever the activity of man or scope of his work, or nature of his interests, the synthesis of all his needs and aspirations comes finally to the kind of government he wants and the quality of justice he wills to direct his civilization.

The cultures of the East and West have given opposite answers to the essentials of human development; and Western groups at different times and places too often have accepted the Eastern concept of authority in denial of freedom, and of status, in disregard of justice. But the peoples of Europe who settled America, after centuries of ways of life, of creeds of religion and of continued wars for land, trade and loyalties, finally have destroyed the power and injustice of absolute authority; and, it is hoped, have now forever fixed upon the cultures of Europe, Asia and America, and some day may give to world civilization, the desire and capacity of free men to govern themselves with justice under laws by them conceived and enforced.

Western representative democracy so ordained is now challenged by the autocracy of the Soviet Union whose peoples are in large part the mixed survivals of Asiatic tyrannies, of tribal hatreds and of intimations of freedoms of Western cultures suppressed, however, by a totalitarian government that knows neither private enterprise, nor freedom, nor justice for the individual, except as the favor of its grace.

Mankind, however, is not without choice. The arbitrament of either reason or war, as in the past, will determine the future of all peoples; but no adverse decision, without appeal, by any forum ever again will be entered against either individual freedom or universal justice. Arbitrary authority will always govern the supine who are willing to be ruled, but not for long will absolute power hold in subjection large segments of oppressed peoples. For however faint the glimmerings, the mind of man everywhere now seeks freedom and aspires to justice, determined to attain both whatever the toil.

VII

THE MANIFESTO OF INTERNATIONAL COMMUNISM, a century ago to the year, was promulgated as its conception of the political and economic revolutions that then convulsed the continent of Europe. These violences, in its understanding, did more than express the purpose of the people to achieve for Germany, Italy, France, Poland and the states dominated by Franz Josef, a modicum of that political liberty which nationalism and the constitutional governments of England and America guarantee. Marx for the first time in world polity posed the problem of unemployment and want, as the workers of industrial centers resorted to violence to assert their needs. He offered, in imitative adaptation of Charles Darwin, survival of the fittest in class struggles that transcend nations and the ownership and control of property by a police state, established by violence, as the solutions for the ills of economy and government.

Marxism is contrary to every conception of the Western mind; but following the Russian Revolution within decades, now dominates the governments of the peoples who dwell within the greater part of Europe and of nine of its nations. As the foundation of a police state, this thesis of status, violence and autocratic power menaces the cultures of all free peoples who seek justice under laws of their making, administered by governments of their choice.

It is this headon confrontation of antithetical root ideologies that imperils world civilization, renders the lessons of past revolutions barren and makes the present world crisis of far reaching destiny. This awe provoking fact probably is more generally realized than the seeming utter indifference of many reflective minds to the full significance and meaning of the following instant conditions of society, and things by it accomplished for the future of man and his kind of justice, as applied by and for the people of America—

1. Since man is not the master of his ideas and law cannot control their effect on other minds, the individual must be free both to contribute and respond to the opinion that rules a free people. And so, although totalitarian states proscribe the civil rights of thought, expression and action, the governments of every free nation must tolerate all ideologies of *pacific* polity whether conceived or espoused by individuals or groups, since they are founded on the inalienable rights of men.

2. It is futile to talk of suppressing the communism of Kautsky whose philosophy is of change, by constitutional methods, to state ownership and control of the nation's resources and industry. But the ideology of Marx makes direct appeal to one class of workers to liquidate by ruthless violence all groups in present control of government and industry; its economy and politics totally submerge the individual in the will of the dictator; its mechanism of control is an international party that owes servile allegiance to Russia; and its partisans, as citizens of this nation active in its politics, have demonstrated their primary loyalty to the Marxism of Lenin and Stalin.

3. The Cominform has disavowed a purpose to convert the world to Marxism; and yet Russia whose foundation rests upon this ideology continues to use its veto and the power of its agencies to *widen global chaos*.

4. The legislative and judicial branches of our government have removed every obstacle to the peaceful change of our representative republic to totalitarian regimentation of our economic and political life—for there are now no constitutional restraints on the will of the people, and so the *way under law to communism is open*.

5. Congress and the President have full power so to use our instant tax laws as to transform our system of free enterprise into instant communism—for there is no present limitation on the power to tax or to spend for the public welfare, except only the inhibition of arbitrary invasion of the rights of the states.

6. With the way cleared for constitutional totalitarian communism, *America should define as a crime any conspiracy of Marxist violence; since it seeks world chaos as espoused by the international party*, which now owes primary allegiance to an aggressor nation avowedly opposed to our polity, *is a present danger to the security of our nation* and is utterly indifferent to world order and universal justice.

7. Since the "greatest dangers to liberty lurk in insidious encroachments by * * * zeal, well-meaning but without understanding," the legislation supplemental to existing law outlawing Marxism, in adaptation of Burke, should not seek to draw an indictment against a whole party. It should not give to any official the power to proscribe an individual or group; nor in its definition of a conspiracy to use violence to overthrow constitutional government should it bar the right to change government by

due process under fundamental law. The legislation should be regulatory to the end of national security, but not deprive individuals of rights immune from judicial or legislative action.

8. It is grievous error, moreover, to assume the abolishment of an un-American Marxist political conspiracy, will save either democracy in government or private enterprise in economy. The ideology of freedom and justice under democratic forms can be preserved *only if owners and workers join in purging their groups of over-reaching leaders, and equity attends the distribution of the products and profits among the three parties who contribute to the joint venture as owners, workers and consumers.*

9. Since the Court has determined the social use of capital and labor, to both of which owner and worker contribute, and since there can be neither industry nor profits without continuity and consumption of production, the basic compensations to capital for its use and to labor as wages *must be supplemented by just distribution of profits to the owner as dividends and to the workers as flexible deferred compensation.*

10. The root injustice of laissez-faire and the primary cause of labor conflicts were extirpated when, by the amendment to the Federal Revenue Act of 1943, justice first sanctioned as legal deductible costs of production all profits shared with labor as bonuses, annuities or pensions.

11. *This law well may be regarded as a grave fundamental change, potential of social justice the most far reaching. Since it is the incentive of the reciprocal employer and worker equities in amicable adjustment and will be the dominant factor in compulsory collective bargaining, it may become the bridge of conciliatory self-interest that will carry humanity over the widening chasm of the chaos of totalitarian Marxism.*

12. There is one human test and constant standard of justice. Society *must restrain the outlaw, seek to restore conditions existing before the wrong and maintain order as essential to the status of goodness. Whatever the recession, all must obey the eternal law of restoration to order; and man moves forward only so long as society holds the outlaw in restraint and maintains as against injustice the open way deemed for the good of all.*

13. Reform or punish the anti-social individual and hold the outlaw nation in leash, *but regard every mind as free to think and to speak and every nation as an organization with limited sovereignty*, and there will be order and justice to the degree that the man of violence and the aggressor

nation are subjected to the control of just minds and dominant nations organized for universal order.

14. Mankind heretofore has failed to restrain the outlaw nation and to hold world society to order only because it has been overwhelmed with *the fear of the futility of any nation or league of nations attempting to enforce just decrees against the outlaw that through force seeks for itself world dominion.*

15. Science has given to man such knowledge of destructive energy that *civilization must now defend itself against its use by the outlaw nation; and so, a world tribunal has been organized by the nations with power to enforce its sanctions by use of atomic fission.*

16. Because the eventualities are so foreboding as to confirm blunder and to suggest suspicions of Marxist betrayal, there can be no veto by any one of the big five nations in any matter affecting the use of this extreme sanction. A great disservice is done to universal justice by suggesting this power can be neither modified nor abolished *without abandoning the organization with instant substitution of a world parliamentary government, and that there is no relation between the use of the veto and the conflicts between Marxism and individualism.*

VIII

A REPRESENTATIVE REPUBLIC IS THE BEST MECHANISM man yet has invented for the reconciliation of group welfare with individual satisfactions, both under the governments of nations and of a world organization of nations.

This confidence has induced the deepening conviction among increasing numbers of earnest and forward-looking minds (a) that the present strife among workers for the control of their unions and between them and their employers for higher wages, better working conditions and a just economic interest in the joint venture; (b) that the intense struggle for survival between private property and its form of capitalism and collectivism with its sequel of communism; and (c) that the strivings for supremacy between class totalitarianism and representative democracy—all and singly, are the inevitable consequences of man's lust for power activated by the worthy purpose of self-realization that naturally motivates his seeking it or of his callous indifference to the nature of its use.

These reflections on the foundation antithesis of man and the state and the attendant conflicts of human interests should close with reference to some facts and assumptions of human nature that are deemed to be the fundamentals of governance:

(1) Man exists in two worlds, a material one of animal needs and a mental life of self-satisfactions and strivings. He has lived to no purpose, if he does not realize his mind adapts his body to its environment; and if in performance of this function and in the animal atavism of violence to win power, he should regard all strivings as only the struggle of the fittest to survive and all government but the dominance of force, rather than as the rule of reason to the end of justice.

(2) Man's social development through the dynamic emergence of his mind was first glimpsed by the lofty confidence of Isaiah in the ultimate triumph of the right, and became Micah's exhortation for the justice of humanism. It is sublimated in the Christ creative teachings and is given modern expression in the profound guess of Erasmus Darwin which forms the beginnings of that orientation of eternal optimism that discerns all life as aspirational strivings, which spiral-like ascend to higher levels and descend only to rise again.

(3) The implications of the Charles Darwin dogma of the "tooth and claw" struggle which degrades man as the puppet of all forces and the supine victim of chance, despondency and power, must be regarded as fundamental error to be avoided by the mind that makes the individual the "captain of his soul," freedom the purpose of his strivings and political equality and economic justice their ultimate ends.

(4) Understanding, purpose and conciliation are the foundations of social and political life; and are the means by which man has achieved individual self-mastery, group self-government, and justice under law. The governing principle of the state is order, and power is its final arbiter; but it does not follow because law ends in the power of the state, that power is the only source of law or that law should be administered as power.

(5) Mind in survival strives to master body and conduct, and the conflict between the individual and state never ends; but this power of control is sought always for a purpose deemed good for the individual or for the welfare of the state, however actually employed by either. Normal

man does not seek avidly for absolute power as such, but craves its beneficial use—as an enlightened mind is not acquisitive of things as such, but is prudential alone because of the societal use of wealth.

(6) World society, national governments and the individual, as a member of the former and as elector of the latter, must now begin the more to distinguish between the vigorous and vigilant strivings of antithetical ideologies of individual worth and group welfare, and the animal lusts for power of aggrandizing political or economic groups or over-reaching bureaus of administrative government or super-secularized hierarchies of religion. All institutions of man's civilization and cultures must now bend to the supreme task of making the realities of justice prevail as the power principles of governance and the valid prescripts of a humanistic economy.

(7) The conflicts that through the centuries have divided individuals, groups and nations at different crises of human affairs have arisen out of religion, politics and economy; and they have partaken of the nature of these human interests as every of them has become dominant in man's development. There finally, however, always emerges from this diversity of interests, the real struggle that is determinative of every crisis.

(8) The decisive issue of this crucial conflict embraces some aspect of all the fundamental interests and always in some manner involves the anti-thesis of authority and liberty; and this because the vital issue in all life relations is eternally between the individual who wants to be free and the state that must subject him to its power, and is determined ultimately by submissive minds willing to have others to think for them or by free men who must think and act for themselves.

(9) Man soon learns that the enjoyment of his desires is measured by his right to assert them before impartial tribunals against others seeking similar satisfactions in like situations. In enlightened self-interest, he substitutes for physical strength the just decision of accepted authority; and so gives to law its affirmative function of punishing the crimes and wrongs of the outlaw and anti-social, repressing the privileges of favor and restraining the oppressions of power.

(10) The acceptance of the fact of struggle for power in political association and economic effort makes necessary our confidence in the assumption that the separation of executive, legislative and judicial branches

is the essential of any government of free men; for any commingling of these functions must result in the dominance of autocratic authority.

(11) The idea that the class conflicts of Marxism for political and economic power reflect a never ending struggle between the legislative and judicial branches, disclosing a purpose to change existing legal systems, confuses a result with the function of totalitarian government and gratuitously attributes to the courts a desire to usurp other than judicial functions.

(12) Neither executive order nor legislative fiat, but only usurpation or the abnegation of its real function, by interpretive distortion of statutes, constitutionally can convert the independent judiciary of free government, in the words of Soviet authority, into an "organ of governmental power, a weapon in the hands of the ruling class for * * * safeguarding its interests."

(13) The instant need is the acceptance of some universal principles that will restore to balance the disturbed structures of society. When the individual realizes that a part or all of what he values most and claims as his may be given to those in opposition or denial and that in all conflicts both the individual and the state must make concessions, then will be made clear that compromise is the foundation of all governance and law, that conscience is the spirit, mutual trust is the need and conciliation must be the means by which humanity can develop its will to substitute understanding in place of force in the domestic affairs of states and among groups in world relations.

(14) And so some day man will write the ascending purposes of a new world of united nations in terms not of power; but of reason and co-ordination and of tolerance and justice as the foundations of law; and for a humanitarianism that avows the separation of State and Church to assure religious liberty and that accepts cooperation as the complement of meliorating competition, which in truth is eternal.

(15) Now that a most momentous change in the mind and moral development of man has separated the functions of government and the religious from secular life—with reason defining revelation, and justice, not authority, as the criterion of human interests and institutions—society and the individual must become more interdependent and both should be governed by the same moral rules that may transcend positive law. For

the personality of the individual defines the nature of his society, which in turn determines his opportunity for self-realization.

(16) A supreme higher law which governs the individual, family group and state—because all freely accept its obvious inherent virtue—then must be the universal principle that holds in balance the relations and reciprocal interests of the individual and society, else there is no fulfillment of the moral purpose of mankind.

IX

STRANGE ARE THE WAYS of inscrutable fate for formulating the scroll of human history. In the instant world crisis, the immediate future of mankind awaits the final decision of fifteen minds in autocratic mastery of Soviet Russia. If these leaders of the forces of totalitarian aggression, in zealotry or fear, continue to thwart the decrees of a world tribunal for universal justice or do not stop the use of methods of terror, purge and concentration camps against free thought, speech and action and persist in their threats and intimidations of violence in aggrandizement of world political and economic power to the global dominance of Russian arms, then indeed the nations of liberty and justice will cease to live as free peoples or they must defend to death the values of human culture and so preserve for civilization the everlasting things of the mind.

These are not easy words to utter and they are written in the deep conviction that America, England and France are without choice and that the mind of the Slav yet will be animated by the aspirations of universal justice. Discerning the futilities of the resurgence of Marxist power and class wars, humanity may indulge the hope that Russia will join her former allies who, in enlightened self-interest, accept the conciliations of representative democracy for the arbitrament of those basic antitheses of life from which the civilization of man is never free.

X

THE HUMAN MIND will never cease its search for what is here attempted—a book of the intimations and recollections, the reflections and ponderings, the meanings and ideas, and the determinants and aspirations of man for justice. For the singular, signal and supreme end of being is Justice; which arises alike from emotion and reason, seeks an absolute of universal thought and enriches the heart of humanity with sane action

that reveals, through endless time, newly discovered patterns of an always more harmonious life.

Not indifferent to the acceptance of the aspects of justice herein conceived for this day, my conviction is fixed, as faith in moral purpose, that mind ever will strive for clearer concepts of duty in its effort to attain a confident and benign personality that renounces self to the *inevitable*—not in supine submission to an assumed providential will destructive of resistance to wrongs, but in obedience solely to those inexorable orderings the individual stoically must bear without harm to his character. And this in neither individual piety nor spiritual holiness, but in the eventual balance and fairness that impel the equities of humanism and the realization of the good of all in everlasting justice under law.

And so, in concluding this foreword, I end a detached attitude of mind and crave to join those to whom my abiding debt was acknowledged in the first volume, with the

INSCRIPTION

TO THE MINDS WHO IN THE HARD REALITIES OF THE UNCERTAINTIES, INSECURITIES AND WRONGS OF LIFE SEEK ALWAYS FOR JUSTICE, AND WHO DISCERN IN EVER NEW HORIZONS—AND STRIVE THROUGH THE SPIRIT OF UNDERSTANDING, PURPOSE AND CONCILIATION TO ATTAIN—THE APPROXIMATE REALIZATION OF THE KINGDOM OF GOD IN THE MINDS OF MEN.

I

NATURE AND CONCEPT
OF JUSTICE AS MENTAL
PROCESS AND IDEOLOGY



Chapter One

NATURE OF JUSTICE

Justice as Ultimate of Law—

MANKIND in universal association, and without emphasis of the nature or purpose of any part, constitutes world society. Human law comprehends society as a whole with persons as its constituents; and its primary concern is their freedom and self-realization under just conditions. The relationships among persons and things, of individuals in inter-relation and of their interests and acts in contact with groups and things are the subjects of its definition of justice.

The essential objects of its search are the liberty, dignity and personality of the individual; the general welfare and development of peoples; the conservation, disposal and right use of property; the preservation of the state; and the maintenance of the order, security and peace of the world for longer periods. Peoples, institutions and states, alike in national isolation or world association, are governed by the law of nature and the positive law of man as found or evolved by his mind.

Enlightened self-interest and mutual aid are the respective primary and complementary motives of human nature and action. Understanding, purpose and conciliation are in judgment the mental processes of human law; appeasement in compromise, cooperation in conduct and co-ordination in function are its means; the order of society and the safety of the state are the ends of its action; and obedience to its mandates is a test of its justice and exemplifies its character. But force in compulsion is the sanction of positive law and implements the power of its justice in the extreme necessity of defending the right and preserving the good as the aspiration and ultimate of the law of nature and of man.

Law functions, in both peace and war, to control negatively man's animal propensities and to soften the asperities of competitions attendant upon the constant struggle to discipline the anarchic individual and to curb

group authority. Social security, the happiness, equality of opportunity and civil liberty of the individual in all aspects of his self-realization are the affirmative purposes of law; and to promote conditions favorable to the fullest development of the character and dignity of human personality is the functional duty of the state. But justice in all relations and to every person, group, institution and state is the supreme effort and highest purpose of the economy and polity of a government of law, and the one final test of its performance.

The governance with tolerance and the culture with happiness of mankind rest then upon a foundation of law. This institution sustains and its dynamic power molds and controls: (1) The reciprocal rights and obligations of human relations, (2) the purposes and wants of individuals, (3) the institutions and needs of society and (4) the functions, duties and mechanisms of the state with its dominant power of sovereignty.

These manifestations of sovereignty change as government, in its determination of the universal good and eternal right, leaves its final mark for humanitarianism upon this rock of law. And the surface of every facet reflects an aspect of justice under law as the ultimate of all interests, strivings and inspirations of the creative mind; since justice, with its postulates of experience, assumptions of reason and standards of value, never ends its quest for an always higher culture and more humane civilization.

Understanding as Justice of Law—

THOSE WHO DENY that the function of mind is either a distinctive mechanism or process, confuse experience with mere being. Man exists because his organism as a whole responds physically to the external, but only his mind records experience when it consciously reacts and gives meaning and value to vital responses.

These physical contacts are the happenings of existence. Our experiences, however, are more than cumulative events, and not only give continuity and meaning to relations between man and his external universe; but the old and new experience so interact and ingest as to give new understandings, cultural trends and enlarged scope to old experiences, as

also purposive growth to the individual organism and progressive development to the structure of society as a whole.

We apprehend the things and comprehend the relations we have lived through, we are in accord with the people whose experiences are in coincidence and correspondence with ours, and we understand the meanings of life and its problems to the degree our experiences are adequate for their solution.

It is because we have not gone through an anticipated event, that we are apprehensive of future adventure; because human experiences of individuals, groups and nations are so variant and their interests so different, that prejudices, conflicts and wars are now inevitable; and because of underdevelopment, inadequate and unripe experience in the evolution of man from animal to mind, that individuals often fail in their life efforts, reformations and religious experiences are transitory, reforms in morals, politics and economy are premature, law enforcement languishes in a supine public opinion and absolute justice remains ever the golden fleece of human aspiration.

The universal prayer of mankind always has been for understanding; and the one prayer of Solomon, inclusive of all others, for a heart of understanding has echoed through the ages. The perfect harmony of the organism, wherein every mind and animal organ performs its distinctive function, with movements in its own sphere so timed and limited as to cooperate with every other organ to the end of mechanical equilibrium and synchronized action of the whole organism, affords an illuminative example of purposive understanding.

The highest level of a mind of character is expressed in its understandings; for the disciplines of tolerance and forbearance assume a mind of poise at peace, and of both receptive and expressive good will. The understanding that character seeks and exemplifies is not alone Locke's power of knowledge, intelligence; nor Kant's tool of logic, reason; nor is it solely either apprehension of relations or appreciation of values.

Understanding, as comprehended by sensitive minds of character and

as here employed, means all of these and this the more: The unity of intelligence of two minds in harmonious accord to the purposive end of giving individual freedom, social value and legal sanction to a mental faculty.

The individual begins to understand himself when he compares or contrasts his present with his past experiences, and in such knowledge places checks upon his present and future action; and thus also, deepens the understanding between himself and the group whose common background and individual experiences impel the exercise of similar limitations. No individuals can continue in social relations, or a group or a nation be born or long survive, unless its members voluntarily submit to reciprocal inhibitions and to those limitations of full understanding, which, in complete agreement and mutual trust and confidence, are founded on or seek similar individual experiences in the pride of achieving common traditions, customs and loyalties.

The gregarious nature of man or the fear of the individual or his weakness or desire for mutual aid, or all or any combination of these causes, by social compact or covenant of subjection, may drive men into association. But only as individuals or groups give understanding obedience to the checks and limitations which sovereignty imposes, alike on its own power and on all its individual and group constituents, will the governments of mankind function in equilibrium for free men and the common weal.

Governments are ordained by power to establish order and maintain freedom among individuals, groups, nations and the united nations. There can be no freedom without order, nor order without law, nor law without a sanction, nor sanctions without justice, nor justice without understanding, nor understanding without trust, nor trust without harmonious accord and tolerance.

Law then is both a moral force and a rule of action enforced by power; but it is essentially and actually a mental process of reconciliation. It purposively formulates rules for the administration of justice by bringing into relations of trust, tolerance and understanding all conflicting human experiences, desires, interests, purposes and aspirations.

Chapter Two

JUSTICE AS CONCEPT OF MIND

Justice as Aspiration and Apogee of Mind—

JUSTICE is the eternal aspiration of man; and as concept, expresses the apogee of mind development in all aspects and relations of life. It is the essence of all thinking and distillate of all meaning, the solvent of all conflicts, the determinant of all interests and the ultimate purpose of all our understandings.

In ethics, justice is the ideal of right; and in religion, it seeks God as the personification of goodness and the deification of its own idea. In politics, it is the order and security of society preserved by the power of the state through free institutions of representative government ordained by democratic procedures. In government, it is the sovereignty of the state under authority and sanction of law formulated by free men who translate the people's will into the realization of their rights—personal freedom, individual development and the general welfare. In law, it is the guaranty of its due process against deprivation of life or liberty or spoliation of property. And this means the state's equal treatment of all before and under its principles of civil freedom, as found in both positive law and the law of nature, without arbitrary discrimination of who persons are, in contra-distinction to their acts, or for any reason.

The pragmatic test of justice in economy, moreover, is freedom of opportunity to work under proper conditions of food, shelter and social security; and in social functions, just balances must weigh relations in free enterprise between the individual as such and a group or the state in the owning, disposal and use of property, the production and consumption of things and the distribution of the goods of life.

Freedom of thought is the foundation of justice and promotes the security of very phase of liberty. The fundamental immanent freedom is of opinion and expression, since it involves the right to think, to believe

and to utter the judgments of conscience and to receive information from and the opinions of others in our fulfillment of the duty of right conduct. It evolves the supplementary duty of tolerance and educes the complementary freedoms of speech and of the press; and thus frees the human mind of all trammels in its control of public opinion, however disseminated, in the formulation and enforcement of human law.

A free mind with freedom of expression and access to all channels of communication is the real and dominant force of world power, and this because between wars it transforms the arena for the settlement of man's conflicts and problems from the arbitrament of arms into contests of ideas, substitutes speech and the pen for the sword, attacks not the bodies but the minds of men and destroys their wrongs and prejudices to the final moral triumph of tolerance and clear concepts of justice.

Justice as Relation—

THE DISTINCTION between righteousness and justice is vital in both ethical implications and practical applications. The former is a state of mind and affects primarily the individual; the latter involves a relation and restores a status between individuals or groups affected by the wrong of either.

Now the instant reaction to a wrong is emotional retaliation or an instinctive impulse to restore the status—in common phrase, for both animals and men to strike back in kind. It is a common observation that man's inclination is to hit before he reflects on his rights; and this because the mere disturbance of his customary equilibrium to his inconvenience or hurt is his justification for demanding the return to status.

Hence, it would seem justice has its roots in our animal natures, but that the reflective processes of the mind evolve principles of right conduct and constantly are raising the levels of the means and methods of their application to actual facts under new conditions of life.

The emotional demand of an eye for an eye and instinctive desire to act like the ordinary man of the group are still psychological fundamentals of law. The growth of civilization may be measured then by the certainty with which the circle of animal revenge is broken; by the nature of the

substitutes of the exact equivalents in reparation of injuries; and finally, by the degree to which faith in self-discipline masters the habits and customs of primitive man which survive and persist to rule our subconscious minds.

"Man when perfected is the best of animals, but when separated from law and justice, he is the worst of all." Therefore, Aristotle defines justice as "the bond of men in state"; and regards its administration as "the principle of order in political society". Justice then is a habit or attitude of mind in the individual; and with an individual in contact with others, it is a rule of association.

The man of right mind is always just; and he willingly limits his freedoms to those of others, and also, his wants to the needs of others and of the state. The relation of justice between men assumes then good and just minds that have equalized or measured reciprocal rights, needs, interests or freedoms in precise adjustment. "That is called just . . . which is in some sort of equality corresponding to something else, as in the instance of wages corresponding to work done."

Justice as Equality—

THE FUNCTION then of justice is to bring about mutuality of trust and equality of relations among men; and hence in daily life, there are two aspects of justice—(1) as between or among individuals and (2) as between the individual and the state.

Justice is done by one individual to another when each gives to the other what is due to him on the basis of equality of exchange. There is reciprocity of justice between the state and the individual when the state fulfills its duty to give to its citizens freedom, security and equality under the law, which protects life, conserves property and assures conditions of well being; and when in turn, the individual requites to the state the obedience and service which it exacts for the security and good or welfare of all. But neither the individual nor the state can impose the will of either against the supreme rule of justice—both must serve its imperatives and obey the obligations of its eternal principles.

It is difficult to conceive a clause more accurate when uttered, but now of greater error or of more insidious import than the latter part of Hobbes' generalization—"all men among themselves are by nature equal; the inequality . . . hath the spring from the civil law." Pollock comes nearer to the truth when he says: "Law cannot make all men equal, but they are equal before the law . . . their rights are equally the subject of protection and their duties of enforcement." The reason for this essential of equality of individuals before the law is that it imposes its duties and penalties upon them on the assumption they are all free agents. Nor is "any man * * * so high that he is above the law * * *. All the officers of government are creations of the law and are bound to obey it."

We are all basically either individualists or collectivists, and this because the fundamental problem of both psychology and sociology—out of which the search for justice grows—is whether the processes of the mind in adapting man to his environment are innate and come from within his organism or are external reflexes stimulated by human contactual association and physical conditions. The individualist believes he is sufficient unto himself in all things, both of mind and of material existence; and he regards government as only for others, since he is free, self-governed and master of his destination. The collectivist is convinced that isolation is the death of personality, that authority over minds and community of effort are the essentials of man's full development as a group and as one of its members. Experience has demonstrated the truth and error of each of these concepts.

The subjection of the individual in the ancient world finally ended in the political, religious and economic ascendancy of his free personality; but within the last half-century his enlarged freedom has made clear the ruthless nature of the over-reaching of the strong and the need of restraints on individual贪欲 and struggles for power, if cultural and spiritual values shall be developed to higher levels and social justice be done to men in greater numbers.

Since justice before the law and in government has given equality to

all individuals of whatever sex, color or creed, there are those who believe the duty rests upon every generation so to continue the work of man's growth that the roots of economic justice shall be permitted to strike deeper into our culture and permeate the consciousness of all with this conviction: That individualism shall become more creative of cooperative ventures and of social values in the just distribution of material products and horizontal diffusion of the comforts of life to more of the world's workers.

Chapter Three

JUSTICE AS MENTAL PROCESS—

Mind as Energy and Oughtness and Tolerance as Justice—

THE MESON is the binding force within the atom. Without its terrific cementing power of the nuclei, electrons and protons, there would be neither nuclear nor planetary universes nor galaxies of universes. So words are more than images of things or symbols of ideas. They are the links that connect ideas in thought and the mesons of thought and action; and as free speech, they become the guardian of individual liberty, the essence of democracy in government, the expression of moral purpose, the sanction of positive law and the spirit and voice of a higher law articulate in the eternal aspiration for justice.

Mind as the highest manifestation of energy warrants the inference of the emergence of being from its processes, but not of its priority in the sequence of all things. Since in actuality we first see and feel the things about us, and then in introspection wonder about the processes that make us conscious of our experiences, there would seem no escape from accepting the continuity of a duality of matter and mind, of thing and idea. The realization of this dualism gives the basis to both the real and the ideal, and permits the assumptions of faith and of aspiration in our thinking; but it does not explain what or why or how it is that we discern meaning in thinking and justice in relations.

We must postulate the existence of meaning in both reason and experience; and our understanding of the right cannot transcend either, but our passion for justice gives to consciousness its highest human virtue—respect for the law—as the force of goodness because of its oughtness and tolerance.

Ideas are not the emanations of our wills, but are in content and effect the responses of our minds to the determinants evolved from conscious

and subconscious experience. The ego of man does not seize ideas or will belief, but the intellect molds experience into the interests, desires and values which develop the ideas that take possession of his mind.

The miasma of man's intolerance arises from his refusal to accept this fundamental of his mental processes; and will continue, as through ages past, to spread its pestilence of racial prejudices, of injustices in law administration, of oppressions in government, of group conflicts and international wars until the universal realization of its truth. Or in self-preservation, the fear of atomic energy impels such purposive control of conscious man and his behavior as to develop in the individual a character that hungers for, and in nations the will to enforce, understanding, tolerance and justice.

Ideas are dynamic and have an emotional value, but are never dangerous in reflection. They become the correctives of wrongs, the heralds of just laws, the destroyers of evil men and the dynamite of revolution when, in anticipation or frustration of their realization, they take possession of the mature conscience and the imagination of youth and arouse the emotions of both to daring action.

Mind as Genesis of Thought and Justice:

MIND is the most sensitive of all vital processes. It dominates and puts the organism in proper relation with its environment to the end of fitness, gives meaning to present sensations, and records and blends them with the memory of past experiences. The physical reaction of the brain to the external is mechanical, but the psychic response of the mind to ideas is both purposive and creative. We see and feel automatically our sense contacts, but we begin to think when they are not in adjustment with the organism, as when an instinct or habit fails to satisfy an interest or a striving.

Thought is the continuous flow of ideas of relation; and justice is the concept of a particular relation affecting human conduct. The genesis of both thought and justice is then a resistance met or an inadequacy experienced, which discloses a wrong to be remedied, a maladjustment to be

corrected or a status to be restored. A just solution becomes possible only when the nature of the difficulty is apprehended, experience upon reflection suggests its possible answers and judgment in understanding has made its decision, after reason has balanced in imagination the foreseen consequences of all possible choices or emotion has ended the doubt as to the proper action.

It is this delicate capacity of the mind to discern relations, detect their meanings, determine their use and evaluate their utility that enables men to formulate the basic purposive laws that rule the universe. Thus, is made possible discovery and invention in science; character in man and beauty in his art; governments and states as political organizations; order and economy in the associations of society; and tolerance and justice in the administration of law, as understanding and reason in conflicts of interests, make their comparisons of human values in the determination of individual freedom and the general welfare.

Ideas of Justice as Conscience of Humanity:

IDEAS OF JUSTICE express and apply to world affairs the conscience of humanity through the law of man as formulated by his institutions, and the law of nature, as revealed by his intuitions and reason. The source of both these aspects of law, and of their derivative human justice, is divine; since God is the personification of the good and of nature, and the only Creator of man and of nature the mind can conceive.

When Blackstone subjects man to "the laws of his Creator" because "the law of nature, being coeval with mankind and dictated by God, * * * is superior in obligation," he only repeats the assumption of Cicero that "we are born for justice and that right is founded * * * in nature" under "a true law * * * diffused among all, unchanging and everlasting." And the most philosophical of lawyers but paraphrases Sophocles' avowal of steadfast faith in "the unwritten and unswerving laws of Heaven, not of today and yesterday * * * but from everlasting."

That man has the natural right to have rights not given by despotism, is proclaimed by our Declaration as "self-evident"—for it holds "that all

men are endowed by their Creator with certain unalienable rights." Moreover, Bills of Rights in the fundamental law of all Western states reserve explicit rights to the people; Plato's ideal republic was ruled by eternal principles of justice as discerned by philosophers; and Aristotle made justice under law the rule of reason because nature had made men both good and rational.

While through the centuries, every profound thinker of creative and dominant mind has intimated but not avowed it, we now may assume the flow of ideas of justice, is through the confluent streams of (1) innate aspiration, (2) inalienable right and (3) the state as power.

Chapter Four

IDEOLOGIES AS DETERMINANTS OF HUMAN DESTINY:

Nature and Function of Ideologies:

THIS COALESCENCE or colligation—for science assumes both a blending and a binding or either—of three forces within the circle of cosmic energy emphasizes the significance of the neglected fact of the universal *interaction* of all energies in time, space and human relations. It too suggests some obvious analogies in the physical, psychical and ethical forces that may illuminate the nature and purposes of the triad, separate the mechanisms which implement each and explain the relation of ideas to ideologies.

Within this circle is one triangle whose sides of *organism*, as the present vital embodiment of past experiences, and of *environment*, as the instant sensorial stimuli, determine the present and mold the future *individual*. Present consciousness has also its source in the past; and the flow of impulses and ideas is simultaneous in *consciousness*, the other vertices being *sensation* and *memory*. And in a third triangle, the sides of memory of past *experience* and of conscious *purpose* define the nature of personality and fix *character* as the ultimate achievement of man and the one absolute of his justice—the beginning and end of all ideas of the good and right and the kingdom of all ideologies within the human mind.

An ideology in its earliest meaning signified the pondering over of any general ideas; but this use soon was restricted to political concepts. Ideologies now define the ideas themselves which are comprehended within surveys of the political, economic or social aspects of society as they relate to both the purposes and functions of government.

Since man sees with both a physical and a psychic eye and his mental processes are as various as human minds and experiences, general ideas differ and ideologies are usually antithetical. The causes of conflict-

ing ideologies are attributable to the differences in the time and place of their development, to the mental and moral level of the civilizations in which they are evolved and to the traditions, customs and laws of the races or peoples whose culture they embody and whose government they create and dominate.

Present ideas are the partly realized ideals of the past and become, in the eternal cycle of meliorism, the aspirations of mankind for a higher level of justice; which however, always retains some characteristics of the antecedent stages of thought and action. These ideals and aspirations grow out of man's self-realization; and so involve the vital interests which discipline his body, control his relations and satisfy his material wants, mind curiosity and strivings.

The disciplining of the animal survivals of man, the governing of persons through control and by subduing the societal outlaw, the fixing of individual freedoms in the political structures of states, the determining of economic relations under the institutions of property and the motives of private enterprise to the end of profit and the universal aspiration for justice to all and in every relation of life—these are the pragmatic human interests, which during the ages have constituted the essence and are the functions of the ideologies that have contributed to civilization through the shapings and directives of education, the faiths and teachings of religion, the uses of property, the principles of politics and the sanctions of government under law.

Democracy as Dominant Universal Ideology—

CIVILIZATION must now build on the foundation that two global wars, it is feverently hoped, settled for all time—the supremacy of Democracy as the efficient and just mechanism of government, industry and trade. We of the Western world have achieved for ourselves and, with blood sacrifice, have saved for humanity this pattern of order, freedom and economy. But too soon we again may have to defend our way of life, and be forced to fight for the conviction that private property, free enterprise and representative government can be preserved and extended only to the degree

free men, in the rule of liberalism and self-realization of the individual, shall bend the nation to the general welfare.

And this in the faith that the world dominant nations will subordinate the sovereignty of each to the rule of universal justice; and, in equal need and burden, thus shall assure to weaker and dependent peoples representative and just mandatory government under their united military protection.

War is the last resort; but must be invoked when all other remedies, once tried, have failed. And this notwithstanding the paradoxical sequel that war is a normal condition of society, with interludes of peace, wherein all antagonists must suffer its inexorable devastations. The development of the human race, in larger vista, is of the progressive growth of civilization to ultimately higher or more generally diffused levels; but human experience gives frequent confirmation to the postulates of pacifism: That wars have removed or prevented evils only by substituting worse ills and so, for a time, increasing the world's wrongs. This assumption becomes an inevitable sequel when the conqueror refuses to temper his justice in peace with magnanimity or confounds it with revenge. "Vengeance is mine," is not a human trait, but a divine avowal.

It is an extreme test of our faith in an ultimately improving world to discern the victor's retaliations and proscriptions, try to perpetuate power, continue to assert authority and seek to destroy the principles of a better life, which inspired and sustained the struggle for the ideologies of democracy. Justice cannot restrain the government nor can forebearance enter into the conception of the humanity of a totalitarian nation, which usurps power under an avowal of the destined world rule of a class through the violent liquidation of all opposed groups of society.

And a democracy, although animated by the spirit of liberty, which seeks its realization in a government and an economy of free men, forfeits its warrant long to endure, if it forgets, in the peace that follows a victorious war, that the eternal and universal foundation of human justice is: Laws of certainty enforced equally and openly by just tribunals; and with

a magnanimity that breaks the vicious circle of proscriptions—the last survival of primitive eye for eye justice.

Freedom to think, to speak and to act alone or in association with others of similar conviction and purpose is a foundation of justice. Take from the individual his inalienable rights of free association, free discussion and free group action in accord with his conception of private interest and the public welfare, and you leave him poor indeed. For he is shorn of all faiths of religion, deemed sacred to the conscience of some; and is deprived of loyalties to every ideology, in measure necessary to all who value mind and its creative potentialities in economic and governmental action.

Proscriptions and Ideologies of Justice—

POWER is alike a temptation and a peril to its possessor and to its victim; because, as Lord Acton says, "it tends to corrupt and absolute power corrupts absolutely"—for it debases the character of its user. But proscriptive power achieves its evil purposes always by arbitrary group rule instead of through a government of law; and its tyranny may be asserted and its authority continued by two distinctive methods applied at different periods. It is of small concern to the victims how or when absolutism shows its authority or applies its power to their hurt or death. For it is a like abuse of the Western conception of due process of law, (1) for a partisan tribunal to punish *ex post facto* an undefined crime, however fair the trial under Anglo-Saxon procedure; as (2) for the complainant who indicts, also to condemn one accused of the vaguely defined crimes of aggressive warfare against, or of subversive disloyalty to, a nation, which might have been only a government of violent usurpation.

The treason against humanity and the crime against its justice are identical in both aspects. A victorious nation seeks revenge or an absolute government desires to continue its power, by terrifying practices that mock the administration of justice, under a legalism of formal criminal procedure.

Nor should the hope be indulged that either the form of government or the nature of the ideology will prevent the injustices of an over-

reaching group, which is inspired by an ideology that it seeks to impose upon society through national domination. Free democracies joined with a totalitarian government in condemning the general staff of the German government, to which every of them under oath owed patriotic service, alone because after Nazism had become a criminal organization, in the after-event judgment of the prosecutor nations, they had continued to be its loyal leaders, knowing its nefarious acts—never, however, previously defined as crimes.

Moreover, power asserted in violation of fundamental justice, grows upon what it feeds; and few minds proud of America's fine sense of justice can contemplate, without fear of its repercussions, the Federal Executive Order which, in peace time, exposes two and one-half million government workers to proscription because of membership in or "sympathetic association" with any organization deemed by the Attorney General as subversive of the nation or its institutions.

We are here concerned both with the suppression of Marxism as an ideology and with power of proscription lodged in an individual executive of the Federal government and manner of its use. Since America was conceived in revolution and founded on violence, it cannot now deny such right. But either violent or peaceful revolution may be adopted only after the existing government has refused to provide the machinery for changing the government or has not altered its form in obedience to the people's will constitutionally expressed. In short, men may maintain with force their dignity as individuals and the freedom and justice by them deemed sacred only when the government itself has become an outlaw by asserting its arbitrary power in disregard of law.

A group of citizens may espouse any idea affecting any private or public interest within governmental scope, but government in order to endure cannot tolerate a party whose cardinal tenet is its overthrow by violence of an aggressive minority. The Marxist party should now be suppressed because its appeal is not to all electors for the common welfare, but to a class to seize power by force for its sole aggrandizement; because

peaceful mechanisms now exist under constitutional laws for the adoption of any ideology of politics, economy or religion without the preaching of force; and because its official and formal avowals of principles and methods of political action, past and prospective, compel the world democracies in self-preservation now to act on the conviction that Marxism is a revolutionary world conspiracy to bring chaos to the order of all governments or to establish in place of the institutions of private enterprise, free government and religion, a totalitarian government solely for the aggrandizement of a minority class who dominate it.

There is a vast difference between a government's duty to defend its foundations by outlawing, under due process of law, any conspiracy deemed inimical to its safety or to crush the group that teaches or uses violence against the existing order; and the utilization by a government in peace of the mechanisms of *absolutism* under the facade of self-preservation—however vigorously protested or far removed from the probability of tyranny—for the repression for any reason of any ideology it may execrate, since no end justifies the means.

As the conflict of ideologies, this Order was intended to control, becomes the more intense; or when the aggressions of Marxism, the ideology it was designed to extirpate, in popular conviction really menace Anglo-American foundations—then indeed power will temper its enforcement with as little of conscience, and no more of justice, than the inquisitions of religions gave grace or mercy to the devout victims of another faith.

Man will develop nature's resources, utilize property, expand trade and achieve the moral standards that assure the attainment of personal freedom, social welfare, national power and the final integration of nations as a world federation—only when the passion for revenge ceases to rule nations in victory and the proscriptions of fear no longer drive them to tyranny. And then only, if and as the principles and purposes of democracy, the loyalties of religion and the aspirations, conciliations and tolerances of justice are the more generally diffused and inculcated among all

peoples; and so have become the more habitual in their work, and are to the full more widely realized in the societal and individual character that craves poise and peace of mind and seeks the good in all men, things and relations.

Instant Challenge to Civilization of Function of Ideologies:

WITH PEOPLES in turmoil, ideas and loyalties in flux and nations changing as force dominates, violence of conflict is now accepted as the normal condition of human society and peace is regarded as an interlude enforceable only by power. And so, the modern thinker, who perceives the growth of mankind as a whole, accepts individual struggle for existence and the rivalry of groups for power as both natural and everlasting. It is, however, a false conception of the development of civilization and a distorted picture of world relations to over emphasize merely the struggles of states or groups; but to ignore or to underrate the mind strivings and aspirations that have motivated the people, who rule, to achieve and to maintain, under justice, their conceived interests.

In physics, it is not the mere manifestation of power, but it is actual change in the nature of the energy that supplies the moving force of the wheels of industry which, through the centuries, has produced the means of life and constantly has modified its customs and ways to progressive higher levels. Man always has used an adequate force of some kind for the power needs of his existence; but he has attained higher spheres and enlarged the scope of his achievements only as his mind has found and applied to the world's work successive sources and kinds of energy, e.g., in the stated order of animal muscle, water, air, steam, gas, electricity, and now atomic fission.

So ideas are the dynamic agencies of mankind and the creative, directive and formative instrumentalities of civilization, which in struggle and war, but not without intermittent peace, have evolved and determined the destiny of man, his nations and organization of nations.

It is egregious error to accept as reality a world pattern of nations in war rivalry for the spoils of power—natural resources for subsistence,

trade, or to make war—and to overlook the mind purposes of men in society, their cultural loyalties and faiths of religion and their aspirations for freedom and justice in economy and government. Such picture of universal rivalry of nations leads inevitably to the final arbitrament of war, which blind fate decrees in successive violences alone for material satisfactions and to the utter exclusion of contributions of the dynamic mind, without which there can be no human development or civilization.

It is not fate which engenders the international rivalry that victimizes individuals and nations. Both are the instrumentalities that have created the modes of life, structures of society, organizations of economy and government and the kinds of culture and religion that are specific unit sources of the conflicts, which have resulted from diversities in the aspirations of human minds at different times and places and which emergent evolution discloses as a progressive civilization.

It is but an attempt to rationalize an error, hazardous to Western culture in the instant crisis, to conclude, on the assumption rival patterns of nations are causal of war, that every nation forthwith must adopt a policy to ignore or accept or repudiate the purposive pattern of an aggressor-nation. It is not the fact of *rivalry* between the Teuton-Anglo-Frank and the Slav-Tartar nations, or between those of Eastern and Western Europe, that compels, instant, definitive and decisive action in imminent world conditions; but it is the *interests of the peoples* of these races and nations and of the whole world that determine the destiny of mankind and manner of its solution—whether by reason or by war.

For it is our *ideas* about things and relations that create our *interests*; and our emotional reactions drive the mental processes so to function as to strive and fight for body satisfactions and mind aspirations for always higher levels of freedom and justice. America abandoned the security of its isolation and gave its treasure and men in two global wars, not because of either desire or duty to control or regulate the conflicts of the nations of Central Europe or of Asia, but alone to save for mankind the freedoms its civilization under the dominance of mind had wrought.

Our sacrifice indeed has been in vain in the crushing of one outlaw totalitarian nation which exalted power to the extinction of individual self-realization, if, when confronted with the aggressions of a nation of similar autocratic mold—with an economy opposed to free enterprise, ethics based on the morals of Hercules and with no place in its government for religion or freedom or justice under due process of law—we now supinely accept the conflict of ideologies between Russia and the world's free nations as permanent and to be incapable of solution because, it is urged, rivalries among nations are impossible of abolition by war and only may be regulated by balance of power.

There have been many wars determinative of the course of civilization and fewer battles decisive of those wars; but rare in the fixation of man's destiny has been the momentous judgment of an individual mind in a position of power to enforce the decision it has made. Few realize the full significance of the choice of most profound wisdom and enduring and expanding justice that ever was made by a human mind. This seemingly hyperbolic characterization of Great Britain's decision of destiny as made by its Premier, Winston Churchill, is written in the confidence time will confirm its accuracy when its full implications, as he must have perceived them, are realized. For Russia, as an outlaw nation, will follow Nazi Germany to her doom on the rock of justice or must take her place with the world democracies in promoting the common welfare through individual minds of free thought and action.

Churchill's choice of Russia instead of Germany as an ally was made in the probability or fear that when the boast of "Germany over all" became as dust under the force of universal freedom and justice, "the bear that walks like a man" might or would begin its steps to dominate Europe, first with strides to the Balkan states, then over the sea nations to the south and north of her, then to Czechoslovakia and finally on the states of Central Europe.

So the world is now confronted with a conflict not alone of nations in unceasing rivalry; but with a struggle to death of ideologies that stem

from the foundation antithetical ideologies of human thought, which the Court of Civilization always has ended with its final decree of enlarged freedom and more delicate justice.

Conservative Legitimism and Progressive Liberalism as Foundation Ideologies—

AS WE LOOK into the far distant past, we can see two foundation ideologies that have struggled through the centuries for dominance in the life of the individual and the development of his institutions. Whatever the aspects of the ideologies that have brought forth distinctive cultures and diverse structures of government, economy and religion in various stages of civilization and at different places on the earth, they all have arisen from, and are expressions of, similar universal innate attitudes and eternal aspirations of minds in antithesis.

The contrast is between those who want or are willing to be ruled and those who themselves must rule; between those who wish others to think for them and those who live by and for free thought; and between those who, in loyalty and duty, obey authority and those who, as individuals, create and control the sovereign power that governs them.

The clinging to the old, the seeking for security in status and in church or state aid, the search for favor in obedience to authority and the prayer of faith for regenerative grace in the worship of a providential power, are (1) the ideologies of a conservative legitimism that have served man at all stages of his development. But in the unfolding of his mind growth, these aspects of human adaptation always have been in stubborn and everlasting conflict with (2) a progressive individual liberalism. This attitude of mind is exemplified in those strivings for change and freedom and in those struggles against the violences of power and the wrongs of privilege, that eventually make real our eternal aspirations for justice as the avowed purpose of an always better life under an ever higher law of reason and the right.

Justice as Ideology of Culture:

THE GREAT MASSES of mankind world-wide have begun, by their own creative, individual and separate group efforts in economic, political and religious polity, to emerge into higher levels of life with new interests, purposes and wants. They have now the knowledge of their power; the realization of how to use it; and the determination to achieve their aspirations for justice under the higher law of a more sensitive social conscience. Revolutionary, if not catastrophic, crises as to the forms of government, patterns of belief and practices of economy now confront the groups and nations of the world, and alike challenge the manner of life of many centuries and imperil the liberties of free people under constitutional law.

Government, economy, religion and ancient secular loyalties are now being modified and adapted to new concepts of universal order, security and justice. This is because of the present intensity of the age-worn struggles between *hierarchies of religion* for creeds and secular rule and among *community groups* for ways of life sanctified by time; between those who have the means of satisfying their wants and those who are deprived of such satisfactions; between individuals who strive for security through ownership or control of property, and nations which fight for land, dominance in trade and supremacy of arms; between conflicting theories for the production and distribution of material things for exchange or for profit; between contending groups for larger use and more equitable distribution of profits; and in fine, between the antithetical ideologies of personal freedom in all aspects of human culture and those of state domination by every kind of police regimentation. It is these conflicting antitheses that require re-examination and involve a new synthesis of the world ideologies of religion, economy and politics.

The issue which civilization must now determine, at the end of its most devastating war, is whether the final arbiter of its justice again will be the force of arms, as the ultimate of the power politics of nations, or the force of reason and right under universal law, as the solvent of human loyalties and interests. It is the people as nations or groups in world or-

ganization that constitute the final tribunal of ultimate decision; but in last analysis, it is the individual that determines the destiny of his world and of himself—for of vital importance is “not only what men do, but * * * the manner of men * * * that do it.”

Man in the grasp of these stupendous considerations is appalled at the momentous significance of the function of the human mind. Its creative power and culture in conjunction with its religion alone can incline the will to reason and control moral conduct. It must instill the understanding of values, educe the choice of wisdom and so finally make certain the dignity of man and his determination to be of free thought and action. And so, only the mind of man can assure equitable decrees in every human relation and for longer periods of peace, to the end that tolerance and justice ultimately may dominate all world organizations of government ruled by the processes of representative democracy under the egis of humanitarianism.

II

**JUSTICE, INDIVIDUAL
ACTION AND CONDUCT**



Chapter One

JUSTICE AS HUMAN NATURE IN ACTION

Action as Animal Response and Conduct as Human Culture—

THE RESPONSE of the body to its environment is human action. Environment is both of external stimulus and innate impulse; and the action may be either physical movement or of mind striving to satisfy human interests. There are five mental reactions that impel or modify human action as man develops to higher levels in realization of his purposes. These responses of the mind in adjusting man to his environment partake of (1) instinct, (2) habit, (3) emotion, (4) reason and (5) intuition. They separately are characteristic human traits and collectively constitute human nature.

Nature includes the entire universe and all manifestations of energy in persons, things and relations. Human nature is neither an abstract conception nor a mechanism, but is a concrete organic development of the essential traits and tendencies of man as molded by his mind. For in environmental adaptation, the nature of man is both of animal immanent wants and a personality of acquired desires—both a human being and a unique character striving to keep and improve the values of life he regards as distinctively his. Human nature is then fluxional, changing with material conditions and the aspirations of human minds, and varying in quality as they differ in processes and purposes.

Man in his vanity has used many words to demonstrate that the nature of his being is unique and distinguishable from other animals. It is, however, only through belief in a revealed creation such assumption can be indulged; for observation and experience disclose the similitude of human and animal organisms in their beginnings, elemental compositions, functions and life cycles. While there is no one characteristic which com-

pletely differentiates man from his animal kin; yet his mental processes and achievements and the accumulations of his experience are so obviously superior to the animal mind as to make the difference in degree one of kind, both in reality and in possible destination.

There are then distinctive processes of the human mind that are so far in advance of animal mentality as to give to man a culture possessed by no other animal. The seven menti-cultural processes distinctive of man are: The utilization of his inventiveness, the communication of his ideas, the fixation of his habits, the socialization of his interests, the realization of his dynamic aspirations and the profundity of his reason, sublimity of his moral sense and range of his vision in time, space, ideas and ideals.

Law and Justice as Concepts of Culture—

SEPARATE DISCUSSIONS of these several cultural processes should be preceded by consideration of two assumptions, affecting principles of law and of our concepts of justice. There is (1) an ideal of absolute justice which determines real justice; and (2) actual instant conditions are reflected in the mind of man and so react on the nature of his personality as to determine both the essence of his law and the spirit of his justice.

Associations of individuals under similar conditions of life give rise to similar religious beliefs and ideas of right from which evolve the conception of a universal justice, i.e., the same rules of law for all peoples, times and places. The ideal of absolute justice is not inferred by logic, but is deduced from customary conduct approved as reasonable by both the experience of the individual and of the group. The rule of reason, in final analysis, as applied by the individual in his determination of right action and as applied by the state through its legislators and judges in the definition of just conduct, is the ultimate means for dispensing justice and the fundamental standard of its measurement.

The concept of absolute justice is predicated on the similarities of all human organisms and their like action under identical conditions; but neither sameness of structure nor of conditions actually exists in either time or place. Diversity is the rule of life; and hence, real justice as deter-

mined by the individual or, as dispensed by the group, is ruled by the pragmatic assumption of differences in individuals and among groups. But in adaptation of Plato, he who would apply the rule of reason to his own conduct or to the laws of the state must fix his eyes on absolute justice, i.e., he is bound by diversities but should not overlook similarities in his search for an application of those principles which are the foundation of right action and of all law.

Competition accentuates differences and mutual aid emphasizes likenesses. If the conflicts between these basic facts of life make community of ownership and equality of distribution of material products the illusion of mutual help, they also suggest that equity in the sharing of the profits of economy and equality before and under the law are fundamental essentials, if justice is to control the conditions of competitive life.

Genius is the most sublimated manifestation of mind; for like the x-ray of physical energy, genius sees through barriers impervious to all other forces and detects relations closed to ordinary minds. The mind of genius may discern in present conditions similarities to the past or project into the future such profound conceptions of justice as to revolutionize world thought; but it is the present that illumines the path of his prophetic equities, which always retain some characteristics of the old from which they emerged.

Both human nature and the law of man are the correlatives of the actual conditions of life and, in growing, tend to conserve their continuance. This is demonstrated by the fact that law has always been in the keeping of the rulers of mankind; and has reflected the nature of the sovereign power, the interests of the dominant class, the forms of the social structure, the means and methods of economic satisfaction and beliefs and the creeds of religion.

Chapter Two

JUSTICE AND ACTION AS AFFECTED BY INSTINCT, HABIT AND EMOTION

Mind Controls Instincts, Habits and Emotions—

INSTINCTS AND HABITS are the results of experience, for both record favorable responses of the organism to an interest or want that craves satisfaction. These responses tend to repeat pleasure and to create the mechanism of satisfaction and avoidance; and repetition makes automatic both the purpose and the capacity to satisfy the aroused instinct. Trial alone determines satiety and only persistent repetition fixes habit.

The essential difference between an instinct and a habit is the degree of fixation of a response. Instinct is an inheritable tendency and a mechanism for constancy of response, and is congenital. But a habit must be learned by conscious effort and its function is developed by use, first by imitation and then by self-imposed discipline.

The mind may will the repetition of muscular movements; and while mental habits do not result alone from concentration, yet they can be changed by choice and disciplined use. So numerous, however, are the instinctive congenital human tendencies, such is the plastic nature of the mind mechanism and its sensitiveness to the interactions of organism and environment and such the plurality of human interests and variety of aspirations—that man has the ability to change his instinctive responses, to modify animal behavior and to mold his action by the deliberate control of his interests and aspirations and by the adoption of body and mind habits that give expression and meaning to such changed interests.

Both physical and mental habits acquire momentum; and thus, habits, customs and laws continue long after they are recognized as harmful or

until the active energy of correction overcomes the negative injurious persistence. But neither good habits can be acquired nor bad ones extirpated without disciplined effort, and this because of the eternal struggle between the animal propensities which persist in our selfish instincts and the strivings of our minds which constantly urge man to higher ideals of culture, individual initiative and enterprise and group mutual aid.

When to mankind shall come the full realization that in this never ending conflict victory always is with the power of creative mind over animal vestigial survivals, then will open to human understanding another lesson of life comparable only to the precepts of moral striving to attain a happy earth life through the realization of duties and performance of obligations, which the rationalist Confucius gave to a practical people; to the "law of grace for all" and the wisdom of avoidance of extremes which the vibrant soul of Buddha offered for the suppression of grief, the development of moral excellence in life and the attainment of Nirvana; to Aristotle's conception of progress that makes the image of the aspiration the assurance of its ultimate existence; to Abraham's conception of one God and His commandments carved on mountain stone that Moses inculcated as fundamentals in the life of a chosen people; and to the admonition of Christ that has heralded for centuries the foundation law of Western individual development and group welfare: "Seek ye first the Kingdom of God and His righteousness," "For behold the Kingdom of God is within you."

Habits and Emotions Direct Just Conduct—

THE HABITS of the individual become the customs and traditions of the group; and thus, the momentum of society. There would be neither civilization nor order; and there could be no law of man for the protection of life and its interests, the conservation of its relations and its continuance under rules of right, unless the human mind has subdued animal impulses and its action had become habitual among individuals and traditional in group cooperation. But such is the economy of life that its constant urge to improve and striving to attain higher levels, prevents the inertia of habit

from atrophying individual initiative and the encrustation of customs from regimenting group endeavor.

Habits then are fundamental categories of human experience and are the resultants of our purposive strivings. They are in conflict with our instincts and with each other; and as they are learned, directed and controlled, they either master us or we them. They make us conservatives or liberals in politics, individualistic or communistic in economy, sociable or rebellious in association and good or bad citizens, responsive to or contemptuous of public opinion.

Concentration, volition, discipline and self-denial have been suggested as four maxims for the development of right habits; to which may be suggested the advantage and the necessity of shunting our emotions, shifting or changing our interests and the emergence of a tolerance more responsive to the loyalties of others—for habits are the savers of time and the stabilizers, directors and improvers of action in the satisfaction of our interests and the realization of our aspirations.

All action contemplates a desired end; and the purpose of all conscious conduct determines its moral value and emphasizes the ethical aspect of law. The ethical test of an act is the actor's state of mind, his understanding of its consequences and the impelling motive—all of which comprehend and contemplate purposes as both pervasive and basic mind determinants of the moral quality of action. This conclusion is not affected by the observation that the emotions actually impel or determine many acts rather than the conceived end which prompted them—for emotion is the impelling, and often decisive, determinant of the moral quality of every act.

Given a purposive end and motives in balance for or against its accomplishment, it is always the stimulus of an emotional impulse that turns the scale; and thus, achieves the end of the purpose as originally intended or as diverted by conscious motive or subconscious emotions to divergent ends none the less purposive, because finally determined by the desires or drives of immediate or remote force of the emotions.

Inner awareness, the pleasure or pain of our experiences define our emotions; and it is immaterial whether we regard emotion as a mental perception or a physical reaction, for the mind both feels the responses and observes the effect on our bodies. Since feeling is awareness of our body responses to our interests in both events and our ideas of them, we may conclude that it is our interests that arouse our cravings for the satisfactions of our wants or conceptions of them. But emotions differ from instincts and habits in the time of the fixation and in the duration of the satisfaction of our interests. Both instincts and habits fix only past satisfactions, but the emotional response is an instant reaction to a present or past happening or to an image of a future event.

The ideals that have led men to the higher levels of purposive striving, and their satisfaction, are dreamed by minds of imagination and of deep reflective power, but of small capacity for action. As the ideals of the dreamers and the ideas of the thinkers become horizontally diffused to less imaginative and reflective but more numerous individuals, who tend the more to action than to dreams or thought, both the ideas and the ideals become realized in the emotions that drive to ultimate individual and group action.

Chapter Three

JUSTICE AND ACTION AS AFFECTED BY REASON AND INTUITION

Processes and Assumptions of Reason—

THE PAST ACT and the future image are the constituents of rational life. Instincts, habits, emotions and ideals all contribute to the delicate mechanism of the moral sense. It is reason that finally determines moral judgments, not because of impulses; but on the ultimate basis of concrete consequences as the measure of moral value which experience suggests in intuition and discloses in impulse, and which imagination pictures upon reflection and in ideation.

Consequences are not valued in morals so much upon the right or wrong of the reaction, as upon the ultimate end or result in reciprocal effect on the actor and on the group; and it is because of the impossibility adequately to measure these actual effects that reason cannot determine the absolute virtue of any particular act or its final effects.

The failure, however, to attain an absolute does not hinder reason from ascertaining in reflection the utilitarian value of the consequences based not upon one ultimate element, as pleasure, even though this be always present; but upon the relative satisfaction of all impulses, interests and ideals.

Since all impulses and interests are not good either for the individual or for the group, and because good and bad impulses, interests and ideals of different individuals are in constant collision, the need exists for the rational control of individual instinctive impulses and for the harmonizing of his interests and ideals with those of the group—is essential to the

maintenance of the equilibrium of the individual and of order under the rule of law that governs society.

The functional end of organism is environmental adjustment, that of the brain is sensorial unification, that of the mind is creative thinking and purposive striving, that of striving is the satisfaction of interests, that of thinking is psychic meaning, that of meaning is understanding relations, that of understanding is rational experience and that of reason is the reconciliation of conflicts and harmonizing of the maladjustments of experiences by judgment in reflection to the consummation of justice.

The process of reasoning rests upon six assumptions, which the consideration of instincts, habits, emotions and interests suggests as valid, and here follow: (1) Impulses and responses are in conflict in the adaptation of organism to environment, and (2) responses of pleasure tend to repetition and those of pain to avoidance; (3) there is freedom in the control of interests and in the choice of conflicts; (4) imagination pictures the consequences of ideas and acts; and (5) judgment in reflection with decision precedes and (6) emotional energy accompanies their emergence either in image or reality.

Reason then has its roots in instinctive and habitual impulses. It mollifies the survival of animal tendencies; controls, regulates and adapts habits; and reconciles conflicts among organic impulses or between the individual and environment to the end of adjustment. It is the intelligent and highest form of trial and error which foresees the imaginative and future consequences instead of the actual result.

It is not action, but is a process which in reflection gives meaning to experiences and in prophesying results points the way of action, i.e., in image recalls past experiences and indicates the instant proper action. It is the instrumentality of reflection, the governor of impulses, the censor of ideas, the judge of action and the director of instincts to the realization of our interests and strivings by harmonizing impulses and ideals.

Essence of Reason and Its Function as Justice—

THE DISTINCTIVE FEATURE of reason is "sagacity or the perception of the essence." Thus, in individual conduct, the essential is that the act shall not injure the doer or another or impair his usefulness to others; the essence of action in group association is that neither the group nor individual shall be hurt by the act of either; in science, the essence is the key phenomenon that unlocks the complexities of energies and conflicts of motion; in religion, it is the individual's discernment of the whole, evil and good, and his relation to the good as deified and personified in a creative and destined purpose; in government, it is the force that maintains order by restraining the animal instincts and anti-social impulses of the individual; in economy of industry, it is "just balances and just weights" in the production and distribution of material products; in education, it is the training of individual understanding as to the true values of interests and the right choice of consequences in the development of individual character; in law, it is justice or understanding of those in disagreement, by the clear apprehension of the essential question involved and the right determination of such issue by balancing equities; and in morals, it is to harmonize in co-operation and compromise the animal instincts and mind interests and ideals of the individual in conflict with his real needs.

The exaltation of pure reason leads to intellectualism, which affirms a thinking self with its subjective conception of the external world, and denies the possibility of real knowledge of its existence or any physical causation or freedom of choice of interests or of will in human action. A distinction then must be made between the pure reason that disregards the nature of the human mind and offends common sense and that "right reason" which is "the one reconciling force in the world."

Back of reason is knowledge; and higher than knowledge is the mind, which is subordinate to the life of the whole organism because it is a function of it. The things felt and known and their reconciliation by right reason are the fundamental intuitions of life. The errors of pure reason which would restrict truth only to subjective conceptions and logical conclusions

should then be avoided by requiring that a rational assumption shall be the essential major premise of every syllogism.

Thus, the assumptions of an existing self, of free choice and of a real objective and moral universe are sound and may become the basic postulates of a philosophy of life and law. A rational premise, like truth itself, must have some value in the practical relations of men; must have a utilitarian use; and must work for the development of individual character, the attainment of his aspirations, the enlargement of his understanding and the increase of his sensitiveness to intolerances and to wrongs; and finally, it must make for the emergence of his purposive strivings and the ultimate realization of his determination that justice shall rule and social harmony shall dominate the relations of men.

Intuitions of Truth, Right and Justice—

EVERY MIND has some sense of true relations and of right actions. These intimations of truth and of morality, of tolerance and justice, are innate and come from experiences of past satisfactions of such nature as to impel their repetition; or else they are responses in present judgment of individual and group good as our organic contacts with environment are transformed into instant experiences. Because experiences, organisms and environments differ, intuitions vary at different times and places and among different individuals and groups of the same time and place.

This does not mean that there are no uniform and universal intuitions as the detectors and appraisers of relations among things or men or ideas relating to either, or no sense of justice as the standard of conduct; but only that our conceptions of justice and morality, like our understandings of human nature and reality, are fluid, relative and dependent upon the emergent sensitiveness, horizon and point of view of the individual mind that determines the relations or judges the action.

There is an absolute justice and an eternal unchangeable good only in their personification. Like the standards in the keeping of government, they are not for actual use in measurements except as the individual strives consciously to formulate—by the choice of his interests and to approxi-

mate by his discernment of consequences and decisions of action—conceptions of governance and aspirations for justice as ends in never ending effort to apply an always higher law in realization and performance of his duty to himself and his progeny, to his fellow-man and his God.

In avoidance of the choice of opposites, neither environment nor the individual alone determines conduct. Satisfactions of creature wants will not supply the deficiencies of character; and the final arbiter of human action is the mind and not the physical conditions that attend the animal body. But it ought not be forgotten that no individual mind in its choice of interests and its decisions, in individual conflicts or between groups or the group and its units, can free itself of the standards and values which have become a motivating part of him during his life associations and experiences as a member of the society in which he matured.

Both environment and mind determine ultimately the direction and destination of the individual and his society. And so man must plan and seek to become a part of an environment of good political, economic and social pattern to the end a mind of character may make the final choices and decisions that determine the nature of human development and right conduct—for it is not enough to conceive justice, it must be done in the right way.

Chapter Four

UNDERSTANDING, CONFIDENCE AND DUTY AS ASPECTS OF JUSTICE

Understanding as Essential Aspect of Justice—

SINCE there can be no justice without order nor order without restraint of the outlaw under due process, the theory of authority under Austin makes sanction the one essential of law. Some students of the law emphasize, as its dominant characteristic, prediction enforceable by the courts; and others stress minds in accord, less than the enforcement of their understandings, as the fundamental element of liability. But these distinctive essentials of law and of obligation—sanction, prediction or enforceability—give only the functional test that differentiates justice under law from other moral rules and unenforceable obligations.

The sanction of the law as prediction, when the state is the instrumentality of enforceability, gives the criterion which differentiates law from individual conduct and supplies a true functional definition of positive law; but certainly, not of law in its comprehensive and fundamental meaning or as it existed in primordial society. Primitive men, as individuals, punished crime by retaliatory physical act or by compensatory fine; and their civil law consisted of understandings among them which recognized reciprocal rights and obligated to similar duties.

It is the differences which exist in man at his ascending levels of development that make understanding the essential of any definition of law at all levels. Similarly, it is understanding which induces the concept of the state as an organization capable of controlling outlawry and of maintaining, within defined territorial limits, cultural standards and its own integral

order by sanctions fitted to time and place—for “the law doth speak with all indifference * * * the law * * * an oracle proceeding from wisdom and understanding.”

The common inclination is to attach too much significance to the material aspects of a contract in disregard to its psychological nature and of its primary importance in the economy of life. A contract is not a material thing. It defines relations and its fundamental essential is psychological, since there cannot be contractual liability without minds in complete objective accord at the same time as affecting, and in relation to, the same thing. All social life seeks the satisfaction of diverse desires at the least cost of time and effort; minds are inclined to appease the wants of others while at the same time they strive to satisfy their own needs. Hence, results those understandings between and among men as to the exchange of economic values in aid of reciprocal human satisfactions; and so also, follows the warranted assumption that a contract merely defines minds in synchronized accord as to exchangeable human values.

Now it is because these understandings hold the anti-social to order and affect the relations of men that governments and law must give attention to contracts and their performance. Indeed, since human existence consists alone of purposive strivings for the satisfaction of desires, the conviction is slowly dawning that the inter-dependent understandings of human minds are the real bases of actual life as it daily develops. In short, man is more the chooser of his contractual relations than he is the victim of economic forces; and hence, he is more the master of his future than the puppet of chance.

Understanding and Confidence as Essentials of Obligation and Duty—
Four mental processes then predominate when minds meet in an understanding of reciprocal aid and mutual obligation—(1) judgment, (2) faith, (3) hope and (4) imagination.

All arbitrary divisions of time are involved, or continuity alone is conceived, in the constant making of contracts between and among individuals and groups and of treaties between and among nations. Whether the un-

derstanding is executed or executory, the same four mental processes predominate; and this because the motives that move minds to meet in understanding are identical in instant as in deferred performance.

These impelling drives are: Reciprocal confidence in the means and the purpose of each to perform his part of the exchange. There can be no understanding without the certainty of both minds that each in good faith intends, and each has the means within his control and the ability, to complete the exchange which each in imagination actually visualizes as essential to full satisfaction. The assumption may be without real basis in fact. In the minds of those in accord, however, it always rests on the confidence that is born of faith in the recollection of past performances and of hope in the continuance of similar conditions and constancy of the same purpose that induced past satisfactions. So also, our limited knowledge of the facts or a fanciful or distorted imagination may lead to a mistake of judgment; but each mind nonetheless has confidence in his understanding that the exchange is of equivalents, or to his profit.

The personal disappointments, the contentions among individuals and the issues that divide groups in struggle and nations in war are in great part traceable to erroneous judgments, with their sure sequels of misunderstandings and loss of confidence. Indeed, it is not a too inclusive generalization to assume all the mistakes, frustrations and ills of conscious life result from confidence lost, because of errors of judgment as to the effects of physical and psychical energies.

It is suggested that the element of understanding is the basis of all law, contracts, duties, rights and obligations; and it is only when the agreements between and accords of two individuals affect the community, or its individual units, that the state may and should enforce individual promises. No overstressing of the functional test of either law or contract can lead us, however, to ignore the essential of understanding as the fundamental of all law, the mutual confidence of minds in accord that the promise of each will be kept and the intelligent self-interest of all that

impels society to enforce the obligations and duties of the delinquent, whose abuse of confidence evokes coercion by the group.

Law, either positive or natural, is neither understanding nor sanction alone, but each aspect is both faith in promises and coercive force. Every understanding between men must now be entered into with the knowledge that the welfare of the group ultimately will determine its enforceability by the courts, for the Supreme Court has said: "This essential limitation of liberty in general governs freedom of contract in particular."

Chapter Five

DUTY AS ASPECT OF JUSTICE

Duty as Conscience Realized in Justice—

THE HARMONIOUS CONFORMITY of conduct with conscience constitutes our actions good, as their discord makes them wrong. It is when we understand this relationship of concurrence of act and conscience, that we conceive our duty of obedience to the call of the higher law. So it is that the aspiration for justice broods as ethical concept, then creates the moral duty of good conduct and finally enlarges the scope and influence of human character. The moral duty, however imperative the obligation, becomes a legal duty only when public opinion defines as positive law the act as wrong and imposes the sanction of enforcement.

Churches and kindred associations of worship are the universal institutions for inculcating morals; and no mind can measure the contribution of the neighborhood church and its ministers to civilization and the development of mind and character. The dogmas and creeds of sects, however, add little to the moral duties which ethics define, religion inculcates and law imposes in meeting the practical problems of everyday life. Indeed, sectarian moral injunctions too often are tinged with dogmatic bias, and fall with disbelief; and more lamentable, creedal fanaticism has invoked the wickedest standards of conduct conceived by man in urging the pious disciple to do what zealotry deems God-service.

The aspiration for justice is man's conscience made real in the tenets of ethics, the principles of his moral codes and the rules of his positive law—however clothed with the sanctions of public opinion. All these disciplines direct and lead us to always higher levels of behavior and action under the moral law of nature as man's conscience is moved—how or why we know not—by changed conditions or forces and as new things or relations are revealed to the human mind.

Thus, the human conscience vitalizes man's ethical beginnings, and becomes the attendant monitor of his everyday behavior and inspirer of the higher law as changed conditions impel the new aspect of justice and duty to emerge.

Inculcation of Duty as Applied Justice—

IT IS ONE of the anomalies of Western cultures that through the mellenia of man's recorded conduct there are codes without number of his positive law; but there is only one codification of morals without sanctions, except as is inherent in its truth, and but one emendation to it. And stranger still, there is yet to be compiled a classification of human duties in Western civilization as they affect the actual relationships of men. Confucius has made rationalism the basis of his moral precepts, most other eastern thinkers have mingled religious ideas with their ethical teachings. Moses alone has graven his code of morals in human hearts and minds, which the basic teachings of Christ supplement with the foundation law of all wisdom for all time—the creative mind as the kingdom of God within man.

The contrast between the "thou shalt not" and the Christ method is striking in their distinctive appeals to human justice. Every command of Moses defines an act which the experience of the tribe condemned as harmful; but he did not prescribe a sanction against the individual for the enforcement of its prohibitions, except as the transgressor suffers with the whole tribe, not so much for the violation of a duty imposed, as for the disobedience of a divine command. His code appealed to individual pride and understanding; and for the first time, law substitutes rational personal responsibility for family liability. Recognition in law is thus given to the fundamental fact of self-help and the individual so is made the unit of society.

The Sermon, however, is not a code with new precepts of moral conduct. It did not tell men how to distinguish good from evil; but it admonished them to be better men by promulgating a new standard of spiritual life and so giving to mankind another source of the springs, and new streams for the flow, of human benevolence. Christ taught the ground truth

that men do not rise to higher life or better things by laws enacted or moral codes promulgated; but they elevate themselves and society alone by change of individual character educed by their creative minds.

Service of the individual for self, the state and his fellow man is the impelling motive of modern life. Crude as this service now may be, mankind after twenty centuries has begun at last to act in matters of economy and government on the proposition that there is an eternal principle of righteousness that rules the moral universe with the same constancy that gravity holds the planets in place.

Justice and Duty of the State—

IN THE KNOWLEDGE that morals change with men and conditions, and reflecting on the millenia that preceded the Mosaic decalogue, the long interlude before Christ's Sermon and the many centuries that have followed without any codification of morals—the great need in our time is of a codification of morals and classification of duties supplemental to but free of dogmas or creeds of religious sects. Such study of contemporary morals should contribute abundantly to the development of individual character; and well may become epochal, if it gives the moral lessons and injunctions admitted by all and, as definitive of the duties of the individual to himself, his family and nation and the world organization and to his God.

The Fabian society through its essays first directed the attention of the Western mind to the truth: That since a state is more than a policeman, its affirmative duty is to seek the remedy for the injustices of economic conditions that breed poverty, inefficiency and crime. After sixty years of persistent and daring appeal to the enlightened self-interest of man, the result is that the primary concern of every nation in today's world is the social and economic welfare of every worker, as well as the civil freedom and security of all citizens against the anti-social or outlaw.

Old cultures in obedience to authority dwelt upon loyalites owed in order to propitiate the divine or human rulers who prescribed the duties. Religion in the dark and middle ages inculcated the call of faith or the

duties of works that the individual may achieve eternal life; the centuries of religious wars involved the creeds of sects; and revolutionary changes in government resolved rights and ordained freedoms.

While through his whole conscious development, man has been moved and directed by the aspiration for justice, yet it has only been within the present century that he clearly has recognized social justice as the obligation of government and the real purpose of life, and fully has realized the attendant moral duties that make justice in all aspects the ultimate of law and duty of the state.

There, however, can be no justice without the translation of duties into rules of action and enforced as law under prescribed sanctions, which ordain penalties for violations. These sanctions may be either to redress civil wrongs among persons or to punish crimes against the state. In either case, it is the vindictory element which enforces obedience to the rule prescribed as law. The agencies of government for the definition of law by legislative enactment or court action and for its enforcement by administrative and judicial tribunals are the mechanisms through which sovereignty functions for the achievement of justice in human relations.

III

JUSTICE, CIVILIZATION AND CULTURE



Chapter One

JUSTICE AND SOME CONCEPTS OF CULTURE AND CIVILIZATION

Justice as Synthesis of All Cultures—

WE THINK without knowledge of a particular function of any one organ that is associated with a special mental process; and it may be assumed, there can be neither mind without organism nor organism without energy. But this does not exclude the possibility of a psychic process of changing or integrating energy; for Franklin's electricity struck without observable cause, and in some particulars mental processes resemble electrical manifestations.

Experience is not wholly a conscious mental process; but as well, is the record and effect of subconscious mind automatically interacting with a present environment in continuous adaptation or reacting to a past sensation. Man exists in space, but his experiences are in time only; and his assumptions endure only while the conditions which first gave them expression continue to animate them.

The pragmatic test of a valid hypothesis is the integrity of the mind that applies it to human affairs. A doubt as to the validity of a postulate may destroy it, but with its death a new assumption arises of deeper understanding of life and at higher levels of human effort. Intelligent doubt of an earnest mind is then the genesis of assumption; and the questionings of causality stimulate creative search for truth in the concepts of science, rules of ethics and creeds of religions, and of reason in principles of politics, equities of economy and approximations of justice in government and law.

The modern conception of the full satisfaction of all primary instincts is a false idea governing the development of man and his civilization. Pri-

many instincts motivate all behavior for the satisfaction of the animal wants of food, shelter and sex; but any one desire should not be over-emphasized, since many other instincts are concomitant of life and its continuance. The impulses to behavior are as multiple as are the interests which impel conduct; and the organism acts only as an efficient whole when all conflicting impulses are in harmony, and never either in full expression or repression of any one primary instinct. Action is always in satisfaction of all impelling wishes, desires and emotions to the end of promoting the individual's understanding of his real interest or happiness, either through his acts in disregard of the group (*laissez-faire*) or for its security and welfare (*co-operation*).

Moreover, it may be assumed the coalescence of all instincts, impulses and motives determines animal behavior and the conduct of man; but it is error to conclude the former can be reduced to a simple impelling drive or to assume human action can be simplified to one pattern of either individual experience or group culture. *There can be neither justice under law nor a philosophy of life predicated on any one instinct, impulse of habit or congenital tendency.*

Hobbes may emphasize fear of authority and Austin authority of sanctions, Spencer struggle for life and Marx strife of classes, Kropotkin mutual aid, Bain sympathy, Smith self-interest, Bentham utility, Freud sex and Watson mechanism; and it may be assumed that all organisms tend to do identically the same thing under similar conditions. But since no two organisms at the same instant are either exactly the same or in contemporaneous reaction to identical environments, there must be a great variety of reactions to the particular interest, impulse or tendency emphasized, with individual behavior as different as the organisms and environments vary.

There is confusion as to the fundamental principles and laws that govern individual behavior and contribute to the actions, which evolve the culture that is expressed in the institutions of civilization. Consideration here will be given only to the more obvious erroneous concepts of behavior

in social and jural relations with particular reference to just economic conduct and political action as they affect distinctive cultures and civilization.

Justice as Measure of Culture—

THE DISTINCTION between culture and civilization must be observed if misunderstanding as to the consequences of the loss of either is to be avoided. Those who give the same meaning to both, logically assume that civilization must collapse with the decay of culture. The error, however, of concluding the old age death of civilization from the decadence of a culture becomes clear when we recall the distinctive meaning of each. Culture is a subjective attitude of mind, and civilization expresses, in its institutions, the objects of culture.

We feel a new stimulus and strive to attain a new cultural level by transforming it into a higher civilization. It is during this period of aspiration that man's mind is creative and his civilization evolves the institutions which express his culture. But when the culture becomes embedded in institutions of law or religion, economy or politics, then the aspiration for it weakens as the civilization it initiated becomes less adaptive and the more exposed to either decadence or revolution; and this because, there is always a lag in the evolution of a new culture.

Here is posed the vital inquiry of civilization as the expression of human development. Can the mind of man eternally create new cultural levels as the old tend to become rigid in the institutions of his civilization, which must decay with age if he can neither preserve the old nor create a new level? It is suggested the full answer to this profound question is not found in the assumption that human institutions are not wholly the result of the processes of nature; but rather is discerned in the conviction that, being ruled by such processes, the laws and government of man in large measure are his creations.

The irrefutable fact is that, whatever his contribution to his governance or however great the degree of lag in his laws, there never has come a time, in the consciousness of his purposive development, when his dynamic mind has failed to create a new level of culture as the old becomes

transformed. Cultures of races, of nations and of continental civilization decay, but world civilization is never doomed to death. The cycle of life is eternal and civilization becomes spiral alone because of the natural lag of its ascending cultures, for always the higher level is evolved as the old passes with the conditions it served.

There are those who, assuming the dominance of the laws of nature, conclude the morphology of a civilization covering a large segment of the earth; because in analogy to all organisms they say, it has attained its maturity and is about to die of age exhaustion. Civilization, however, is not an *organism* or a vital structure; but is rather the expression or materialization of the full life, developed by society under world institutions and all forces that emerge as *organizations* from the distinctive cultures of many sectors, groups or nations.

Moreover, the despair that induces the fear of man's capacity continuously to supply new levels of culture and of justice ignores the dynamic mind as the creative energy of nature's processes and its contribution to man's mastery of nature in bending its laws to the uses of civilization.

Chapter Two

JUSTICE AND POLITICAL AND MORAL STANDARDS OF CIVILIZATION---

Concept of Purposive Progress as of a Causal Universe—

ASSUMPTIONS reflect the time and place under which they are conceived. They are useful, meet the conditions of life and solve the problems which experience then and there asks. As theories or principles of interpretation or rules of action, they are valid and moral so long as the mind and its external environment remain in similar relation as when the assumptions first were made. When our observations of the facts change on which our assumptions are based, we must then re-appraise their values; and so, is introduced the highest level which the human mind attains—the faculty of judgment that measures things, defines conduct and determines relations.

It is this judicial process that differentiates man from other animals, enables him to record past experiences and compels him to compare and contrast his instant interests and conditions with his memory of the past. Thus arises the conception of progress; which explains the interdependence of changing stimuli with the origin and growth of ideas, the continuous development of all forms of societal and political life and the horizontal diffusion of knowledge in expanding waves of mass education.

And so the enlargement of the field of scientific investigation, with increased precision in the study of the factors observed, has added accuracy in the discerning of differences, more delicacy in the detection of relations and larger scope in the successive formulations of the bases of science. It has given higher conceptions of justice to the fundamentals of individual conduct and greater toleration and deeper understanding to the conflicts and struggles of groups.

Progress is a relatively new idea in thought; and that of the purposive function of the creative mind is of even later acceptance. There are few suggestions of either among the Greeks, since their minds were dominated by the concepts of finality, permanence and authority. Although their philosophy conceived change as eternal and Aristotle assumed the existence of different levels, suggested the aspiration to advance to the higher level is evidentiary of its ultimate existence and postulated a primordial "essence" which permeates and controls all life; yet the universe for all Greek philosophers, with the exception of Empedocles and Heraclitus, is complete when made. No new structures or organisms emerge; for them in the words of Aristotle "the same things that exist now existed always moving like a circle, returning upon itself or in some other way."

A new philosophy was necessary to give birth to the ideas of purpose and progress; which conceives reality and its categories not as tangible things of unchangeable existence, but rather as the levels and symbolic tools of life in such process of change as purposively create new experiences from old, higher values from lower and better conduct and more exalted character from an animal past—the philosophy whose foundation is the doctrine of creative or emergent evolution.

The concept of reality as progress manifests itself in all forms of purposive effort and is coincident with resistance to or a stop in the accustomed flow of subconscious mental processes and of automatic and instinctive action. It is when the conscious mind feels an effect and thinks of cause and remedy that it perceives reality and conceives both purposive and progressive acts of fitness in adaptation to environment. This thinking of causal relations has progressed from the fear and superstitions of magic, through an assumed universal law of causation, to the combined uses of a particular event which science foretells will repeat itself with the recurrent interaction of the same causes.

Political and Societal Progress as Standards of Civilization—

PROGRESS OF CIVILIZATION became a concept when inventions, with increasing acceleration and ways, affected man's life; and consciousness of

purpose directed the economy of his efforts to increase his comforts as his mind discerned and applied the laws of nature in developing its resources. No misinterpretation of man is so destructive to the development of his civilization as denial of the truth: That moral development of his personality and society attends the scientific achievements of his mind. This denial may be urged only by those who in egregious error contend man can neither control nor direct his dynamic mind—being a robot ruled by his machines as the final achievement of his mind.

Neither factual nor emotional appeal can, however, change the convictions of those who see no improvement in ethical values as primitive society, no longer dominated by animal wants, attains higher levels of mind control through mechanisms of government for restraining the outlaw, conciliating conflicts, and satisfying the higher needs and changing aspirations for justice. These instrumentalities in the development of civilization are no less observable, real or necessary than the inventions of science for the making of material things for food and shelter.

It has been some years since Dillon emphasized the ethical aspect of law, contending that public and private morality is its purposive end; and now even indifferent observation confirms the growing tendency to test the validity of all legal principles by the standards of human needs and to make social value the ultimate test of economic and political powers. As functional utility in the balancing of interests has succeeded slavish imitation in continuity of tradition and custom, so understanding in the right determination of relations has succeeded mere analysis and analogy.

Political and societal progress results when earnest minds of character and purpose doubt that "God is in His Heaven," arouse public opinion to rebel, break through the "cake of custom" which conserves tradition and, giving effect to the wants and aspirations of all individuals, take power from established authority and give laws of a higher level of individual justice and of enlarged welfare.

Of course, progress is not the mere narrative of the achievements of men of genius. The instrumentalities and institutions that have contributed

to the progressive development of civilization are: War as the primordial, perennial and decisive expression of group struggles; freedom of action, division of labor, property and democracy as the essentials of individualism; co-operation as the tool of mutual aid; the *family* as the founder of the state and the first group producer and protector of property; law as the institution for individual understandings and conciliations and the arbiter of reciprocal justice in individual and group conflicts; and religion and government, the instrumentalities for the protection of the great society against the anti-social propensities of its members and the conservators of its order.

It always has been, however, the great personalities of mind, power and force of character, who in preview have cast their vision of the future on the screen of human strivings, that have charted the course and have led the masses of mankind through violence of arms and prejudices of race, color and creed, through struggles of greeds for lands, profits and power, and through conflicts of ideas, philosophies and aspirations to always higher levels of understanding and group welfare.

Both from the viewpoints of the well-being of the individual and the conditions of his society, the purposive development of the individual and of the group are complementary to the end of social progress. This, however, does not mean the balance between the social organization and the individual is so nice as to make unnecessary any discipline or check on individual conduct.

Man is yet an animal, and a system of positive law with its sanctions must continue to reconcile the antagonisms between his animal nature and societal structures. The mind of man is not static. His social mind is just emerging and with startling rapidity its dynamic manifestations are formulating instrumentalities and organizations which are revolutionizing the political, economic and social life of the great society in all its aspects; and too is changing the law as its interpreter.

Justice and Moral Cultural Progress—

IT IS HERE ASSUMED the mind of man transforms the animal into the man of purposive progress, wisdom and justice. The progressive development of man and the evolution of human culture express the same concept of growth to higher levels of life for the individual and group; and rest on the assumption of successive changes in the functions of man that cause such improvements. These changes are inspired by the dynamic emanations of the human mind which first sees and feels something that excites its curiosity; then creates a desire; then follows a striving for satisfaction of the want, which is always for food or comfort of body or sex or defense; then the invention of means for our satisfactions, which is the foundation of all development; and finally the habitual use by the individual of the improved tool and its socialization, which is the culture of the human mind.

Physical well-being today, except where war leaves its mark of the beast, has attained higher levels of comfort and welfare and has touched the lives of more individuals than heretofore in the history of man. But what of the intellectual development of the individual and his moral fiber as well as of his society? Since only what can be accumulated by, and transmitted to and from, successive generations may be regarded as either individual or societal progress, the perfectability of the human intellect and of the good life in appraisal of culture become of more vital significance than the obvious fact of material improvements.

It seems easy to accept the usual conclusion that there is an intellectual but not a moral progress: That the ideas, truths and inventions of the mind become the intellectual capital of mankind, continually increasing in volume and expanding in its diffusion. That habits of right thinking, of forthright conduct and of aspirations for the good life are but personal acquisitions, and cannot be accumulated, transmitted or inherited.

But it would seem idle to attempt to differentiate between intellectual and moral progress, since history cannot demonstrate the superiority of the modern over the primitive mind in the processes of reason and imagination or of will and character. And particularly, because the true dis-

tinction is not between the intellect and virtue of the individual, but rather lies in that which is and is not progressive culture in both the individual and the species.

There may be few fundamentals of morality and all might have been discerned by the early minds, but they are of unending application as conditions through the centuries change. These standards of justice and truth are fixed in the unchangeable characters of Socrates, Moses, Jesus, Buddha, and other teachers of morals, and in their precepts as aspirations of men of all time. So also, at more common level, a good mind and a will for right conduct make for human progress not only of one individual but of all in contact with their benign influence.

The habits of moral restraints on animal tendencies must make easier for each succeeding generation obedience to personal duty and to ordained law; and consequently, the constant growth of virtue and the good life in the species. Hence, it may be assumed the increased ease with which animal wants are satisfied through social organizations should mollify animal violences and make for less need of societal and individual moral restraints. Man today more clearly observes his duties and obeys the sanctions of the group than when with red claw he satisfied his hunger and sex cravings.

The difference between the animal-man who first recognized the other fellow's right to his bone and modern man who obeys the law of property, as between the men of succeeding generations, is that of degree alone. The mastery over the animal becomes the easier for successive generations; with the few of each raising the standard of conduct for the individual, which becomes the heritage of the many.

There is a vast difference between the mind and moral heritage of the child who in fear saw and worshiped his ancestors in the fitful altar flame of the cave and the child who in love learned the foundations of the good and true life as exemplified in the exalted characters, with Christ the sublimest, that through twenty centuries have taught and led the civilization of man to higher levels of culture. And yet the mind of the cave-child

might have been as alert and his life as faithful in its loyalties and virtuous in its conduct as that of the instant heir to the culture of the ages.

This trend of moral progress in social integration and individual adaptation is not a wishful assumption, but is an observation of race experience. It is an obvious and momentous fact that loses none of its force because the progress is cyclic and not vertical nor because its truth may give a false confidence to the future security of society, nor of greatest moment and deepest significance, because an unjust distribution of the profits of industry has concentrated the material wealth, and autocratic employer or labor groups threaten to impair the economic and to dominate the political power of the nation.

It is, of course, logical to assume the continuance of progress if the fact is accepted as a racial experience; and in larger vista, the postulate is true. But he indeed is over-sanguine of the uniform wisdom of man's choice of his interests, who allows for no blunders or who does not realize the changed conditions of life which sometimes have cast down and overwhelmed the human will. There is small danger in accepting the lessons of experience, for by them we learn to live and live to learn.

Since we attain our ends and consummate our purposes only when our minds make the right choices of interests, we may be sure man will not cease to strive now that the group mind has emerged and social control imposes more delicate choosings and parlous decisions. The mind always has accepted the new responsibilities which the emergence of higher levels imposes; and it will not cease to function in independent control of the future economic and cultural processes of society, because of its confidence in the progress of the race based on its memory of its past achievements. It is inane to assume man will ever cease to seek for his economic welfare in his own just governance or to train himself for those needs.

Chapter Three

JUSTICE AND ECONOMIC STANDARDS OF CIVILIZATION

Private Enterprise and Economy of Profit Motive—

PRIVATE ENTERPRISE and capitalism are foundations of Western culture, which have contributed in large measure to civilization. It is the inclination of many who control capitalism to affirm its sameness with private enterprise; and yet it can only induce misconception and error to regard both as meaning the same economic fact. They are identical only in defining the production and distribution of things by private and not state owned capital—only in their denial of communism. But they differ in fundamental essentials.

Individual enterprise has impelled man always to provide for his self-realization by his own mind and the tools by it invented for this purpose. It is the drive of a mind to individual action as opposed to group or state undertakings under plans by either initiated. Capitalism assumes the contributions of many owners to the common capital of the joint venture. Private enterprise gives expression to individual development as an attitude of mind. Capitalism is an institution of civilization created by the minds of individuals, motivated by strivings for free enterprise.

Its essential characteristics are: (1) Capital as means of world wide production and distribution is owned or controlled by a tithe of the whole population, and over nine of every ten of all people must work at a wage for the owners; (2) its purpose is to increase and (3) through its use to make a profit for its workers and owners. (4) This advantage to the owners and dependence of the workers imposes a grave responsibility on both, and (5) challenges the state to do justice to the *owners* and *workers* in the joint venture, and to the *public* who consume its product.

Profit incentive is the basis of all economy; and it is because some of the relatively few leaders, who direct this vast dominion of capitalism over the lives of the workers, and so build a universal civilization, have not met voluntarily this awful responsibility to the satisfaction of the workers—that in every nation the stubborn owners and determined workers, in strike idleness, too frequently stand face to face; and both too often are willing to accept, or are resigned to chance, the fate of violence rather than to seek the conciliations of justice.

Such tragic threat to world economy, the safety of states and the order of civilization should silence all talks of RIGHTS of either labor or capital. For in the instant peril of civil violences that may presage civilization's decadence for a time and in places, the only immediate solution is that the power of government under authority of an impartial tribunal, during a fact-finding interlude, shall give consideration to the obligation of both labor and capital to the consumer public on which both are dependent, and shall stay the final judgment of justice until understandings allay passions and supplant greeds.

Those who would abolish the profit motive from human economy must distinguish arbitrarily between the making of things and the making of profits. But this confuses human activities with, what they assume to be, a predatory interest or trait; and must ignore the distinction between the economic fact of production and the motive which induced making a thing. Primitive man as animal knew only his immediate satisfactions, by stealth or force; but with the subjection of his animal nature to the order of his mind, man found, hunted and made more things than he needed for instant consumption.

It was only when this surplus was stored for future use that trade or exchange became possible. Minds in exchange of things differed because of their distinctive separate wants, to satisfy which, each actually was motivated to make the trade. And so an exchange of equivalents deemed by each as just because distinctive and satisfying to each, and not alone a predatory instinct, motivated primitive transactions.

Production, distribution and consumption are the economic processes which sustain life and adapt it to environment at successive levels of mind control of the animal nature. There are, of course, some contrasts between predatory instincts and the productive traits, but both stem from the joint effort of man's animal survivals and of his mind purposes to produce more than for instant consumption. *And it is the contribution of the creative mind that makes possible a profit when this excess for future use in economy is produced and the individual in trade receives more than he gave.*

This surplus of production has increased as the human mind has changed its tools of work in mastery of its environment. With every epochal change in the method or manner of man's work, and in accord with the laws of compensation, have come more diversified activities of more mind and muscle workers and larger distribution of profits as contributions of mind. The changes in man's condition have followed the law of all vital development—frustration creates the need, which a dynamic energy supplies by inventing a new tool for use by the whole structure.

As the human organism is the marvelous mechanism of organs synchronized by mind, so the structure of society and the successive conditions of mankind in its development reflect the nature and kind of power man has found and applied as tools in doing the work of the world. Wholly brutish until he tied a stone to his hand, he subjected the power of other animals to his uses; and binding them to a crooked stick they became a part of the land, which now yielded him food for his labor.

And so, the production of things for instant use and trade and attendant profit increased as power became more fluid and efficient, and invention enlarged surpluses and diffused more generally and equitably over larger segments of the earth the things that contribute to human life and culture. But the issue of the just distribution of the profits created in economy by the mind of man is the problem of the ages which the everlasting principles of justice can alone solve.

Sharing Profits as Justice of Profit Motive—

THE NEED of civilization is a new definition of justice in the computation of the worker's compensation that will give to him such equity of the profits of industry as will assure his economic security; and thus, also remove misunderstandings as to the use and ownership of property.

The justification for a revision of the worker's compensation, both as to amount and form, does not rest on the obligation of society to measure the value of personal service by an individual product. Since the division of labor has been carried to such detail in modern industry that the labor of one is infinitesimal to that of all employed in the finished product, it is absurd now to suggest, as once it was contended by the early socialists, that every worker is entitled to the produce of his own labor.

While society is under few duties to its individual constituents and the whole life of every of them is within the orbit of the state's power; yet for the individual worker's life there are four essentials of a good society which the state should translate into duties: (1) The instant welfare of every worker, (2) the removal of all impediments to his continuous development to higher levels, (3) the constant opportunity to work at a fair living wage, and (4) his participation in the just division of the profits to which his labor contributed.

Consideration here will be given to the duty of the state either to provide incentives for or to compel through visitation the equality in distribution of profits or to adopt both the methods of advantage and compulsion to attain the end of just profit sharing.

If the emphasis is placed on the sacrosanct nature of private property, or on the absolute right of the individual to enjoy property and to exclude others from its use as the owner wills, then, of course, the injustices of the instant method of compensating the workers can be cured only by the abolition of capitalism—for the workers are seldom the owners of the material property which is employed in production.

But if the social aspect of private property be accepted, as it now has been announced as the law of the land by the Federal Supreme Court,

then it is as unsound in reason as it is unnecessary in practice to contend that ownership of property in common, or by the state for all, is an essential of the just distribution to the worker of his produce or of the profits of his service in exchange for its value.

Two ideologies from this alternative statement of the nature of property then divide men's minds on the manner in which justice can be done the worker: The concepts that there can be no sure basis of profit distribution to the numerous workers without (a) a change of structure in the social organization of the state and (b) the change of leadership of those in control of its government and economy.

In the first theory the *state* is dominant with a centralized bureaucracy which socializes and communizes the ownership of private property, attempts to regiment production and to support the workers on a standard of meager subsistence; while under the second plan the *individual* is the master and supporter of the state, and private enterprise so functions through private ownership in capitalistic production and decentralized administration as to give to the people the highest standard of living.

However in the conflicting interests and changing conditions of society, it would be presumption to suggest any one remedy as the solution of all economic and social maladjustments. It may be urged, moreover, no relief of permanent nature is possible until by profit sharing the worker, from free choice and intelligent interest, gives his loyalty and best effort to the venture and the employer appreciates the service and grants just compensation to the worker; and thus, both inculcate the fundamental of co-operation, and profit sharing supplements every effort of equitable adjustment.

Hence, every plan of profit sharing should be conceived, formulated and practiced in the larger picture of an evolutionary change wherein a purely individualistic acquisitive system of competition is in progress of transformation into a more co-operative venture of co-ordinated service for predominantly societal purposes.

There are many shades of color and it is their blending that gives

artistic beauty to the commonplace; and there are many points of view and many gradations and places for the emphasis of particulars that give variety to opinion. It is the desire to place all life in a common mold, to bend all to uniformity of desires and satisfactions and to include all activities and values of conduct in one rigid formula that must result in the irritations, frictions, conflicts and misunderstandings of life in every relation. Thus may be explained the failure of many and the refusal of some to regard as profit sharing the contributions of many employers of their millions to the social, educational, healthful and recreational welfare of the workers and the public, by providing the material facilities for these purposes.

Certainly, the city of industry which the employer plans and maintains as a center of health, education, culture and of happiness for the workers in the doing of their bit of service in the hive of human industry which his mind conceived, could become a dream realized in stone and steel only through the profits of the capital which he contributed and the labor of the worker which it afforded the opportunity to give to the joint venture. Multiply one such dream realized many times and then again multiply by similar contributions from like motives of separate gifts to and for parks, play-grounds, libraries, schools, colleges, hospitals, churches, museums of art and science. Then ponder the billions of profits that the minds and hearts of the employers of men have shared with their workers to the welfare of the great society as, in the light of their experiences, they conceived to be the sensible and just way to make better men and to improve the workshop world.

The shadows that mar this picture, however, are observable to all, for all employers are not philanthropists. Even the acquisitive methods of him, who in excess of plenty is charitable and in death is generous, may be deemed the necessities of crude and harsh competition, which if not adopted by him, at whatever cost to his better nature, will make impossible the material success of his venture and thus deny to his pride of achievement the realization of his dream that is the drive of his striving.

The present system of profit making and distribution should be judged then not by what the best of good employers do with their profits, nor by what good the most of them may contribute to their workers and to society; but rather by the degree and kind of justice the system permits, and the law exacts, during the functioning of the means and methods for the instant production and distribution of material goods and the sharing of industry's profits.

IV

JUSTICE, CREATIVE
PURPOSE, MORAL POWER
AND JUDICATORY
FORUMS



Chapter One

JUSTICE, CREATIVE PURPOSE AND MORAL POWER

Aspiration for Justice as Moral Power—

A VITAL CREATIVE POWER transcends intellect as an emotional urge or aspiration, something apart from either reason or will. It drives man and his civilization to unfold, as the crysalis its butterfly, a new aspect in human relations in always closer and more intimate coalescence within the animal and mind realms. The wonder of this process of change and creative synthesis is that the eternal aspiration for justice, in endless time enduring and over enlarging global areas, ever is transforming the individual into a seeker of the right and doer of the good at always higher levels.

This cosmic plan man dogmatically calls evolution. But since it is the emergence of energy under the dominion of law to the end of order and purposive development, he must accept it as the manifestation of a supreme moral power or forfeit his faith in reality, and abandon all hope of a better future in a despondency of fate mechanisms beyond his comprehension and of chance relations, which his mind can neither change, direct nor improve.

Since truth is an assumption of reality, the right but an expedient of sanctioned conduct and pragmatism a theory of utility and not a philosophy, we may make the freedom of the human mind to choose and to act the basis of our practical thinking; and posit a philosophy of human action on the postulate: That animal propensities and human mental orderings are the expressions of a cosmic appetency.

It must be granted, however, our universe of mind and morals can never be finished nor made perfect by any principle—for chance is always a factor. It is also true no two organisms at the same instant are exactly

the same or in contemporaneous reaction to identical environments; and hence, individual behavior is as various as the organisms and their environments are different.

But this does not mean we may not conceive a better society and experiment for its achievement. Consciousness is the functioning of our minds in the experience of action; and we know reality only by overcoming the obstacles of life and correcting its maladjustments through laws, institutions and methods of trial value. These aspects and uses of moral power are evolved by men of intellect and character whose ethical attitudes and mental processes make them feel most alive and sensitive to conditions of injustice. Their fiber, however, toughens as their conviction of justice deepens; and becomes more tempered and determined when either apathy or opposition is encountered. For concepts of justice grow as things of life, gradually to full stature and maturity; but if hurried, may wither, and are killed, if forced.

On observations of automatic responses and variant behavior, a modern school postulates a mechanistic psychology. In the elimination of purpose from action, behaviorism substitutes blind chance for a basic energy under cosmic law, assumes accident gave life to organisms and meaning to mind and affirms freedom is illusion and justice but the final expression of power. It seems superficial to conclude because an organic response is observed to be automatic or necessary, that it is solely mechanistic; and consequently, to exclude the possibility of either a purposive impetus or moral tendency under operation of a universal law applicable to all energy at all levels of integration.

It is consonant with every assumption of science to affirm that a cosmic energy governs a mechanical universe; and that the conscious and creative human mind of moral purpose is its most delicate and complicated form and sensitive expression.

Justice as Moral Concept:

ALTERNATIVE REASONING cuts knotty problems but often leads to oversimplification, for its opposites seldom are mutually exclusive. Philosophies

of life experience, with the exception of Aristotle, early divided on the opposite assumptions of self-determining action and response-stimulus behaviorism, between vitalistic mind choice and mechanistic fate-chance, between a freedom of will that determines destination and a determinism that makes illusionary our wills.

The idea of synchronized fission and synthesis of the atom and cell changed the emphasis of creation from the making of something from nothing to the production of a new structure from an old integration. This tendency to synthesis expresses Aristotle's process of change wherein the potential formless continuously is assuming the form of the thing or idea ultimately to be realized. The conception that gives real and paramount significance to the emergent new development and less to the nature of its separate constituents, is then the distinguishing characteristic of modern scientific thought.

The distinctive characteristic of the human mind is man's freedom of choice of his interests and acts. So is imposed on the individual, responsibility for his own conduct, which in turn comes from and is the external manifestation of his inner self, the heritage of the interests, the motives and strivings of an innumerable ancestry.

Intelligence is then the architect and builder of its own character and world. The sequel of this foundation concept is that as man progresses in the achievement of his purposes, the more sensitive becomes the realization of his creative responsibilities. The more beneficent his purposive strivings, the better will be societal structure; and the more harmonious his relations in the knowledge that society is both material and spiritual and neither alone, the better fixed in human affairs becomes the fact that justice—as the ultimate of law in understanding—both imposes obligations and protects rights.

The classic assumptions of this integrating agency—Plato's soul essence of unity and Aristotle's entelechy that impels to purposive realization—clearly anticipate the notions of our modern thinkers of a primordial energy that permeates and molds all matter: The "fitness" of Hen-

derson's biochemical universe; the "life filament" of Erasmus Darwin's conjecture; the "life force" of Shaw's guess; the "monads" of Leibnitz; the "dynamic psychic energy" of Ward or his and McDougal's "purposive strivings"; the "elan vital" of Bergson in imitative adaptation of Ward; and Bethe's "meson," the cementing medium of the atom, that fixes all integrations and holds them in time and space.

However, it should be observed: (1) That while both ancient and modern conceptions assume this organizing principle acts upon both inorganic and organic matter, the modern thinkers regard the cosmic urge as the striving of the integration itself and as the emergent characteristic of the new level; (2) that Plato and Bergson, as neovitalists, make mind both the basic force and apical manifestation of life; but that Ward and Morgan, in accord with most modern biologists, follow Aristotle, Comte and Erasmus Darwin and (3) regard mind as the realization and synthesis of all impulses, interests and strivings of the human organism in its ceaseless dynamic effort to coordinate with its environment.

It is suggested this last pluralistic conception of the universe may be reconciled with the unity of Plato and the duality of Bergson by the assumption of a cosmic energy in a dynamic state of becoming. We may then postulate a monistic basic energy with pluralistic fission and integrating manifestations at different levels; and mind then becomes both the highest level of all purposive strivings and also the interests, motives and strivings themselves really functioning as mind in its creative activity. *Thus the mind gives meaning to the contacts of the organism and realization to its vital needs, is the man.*

Ignorance and superstition confer a degree of contentment and often full surcease to sufferings, to which deprivations and the inequalities of conditions subject great masses. It is only a thinking mind that wants things; and desires cause the mind in imagination to feel the needs and finally to plan their realization. Aspirations supplant ox-like passive endurance and apathy only when education gives the glimmerings of knowl-

edge to the masses, and diffuses among them its energies of curiosity with its attendant individual striving for satisfactions.

Justice as Creative Purpose of Moral Universe:

To THOSE who believe the human mind molds men and things in adaptation and leads them forward, there is the conviction of certainty that ideas and theories of life formulate the laws, the potential actions and the development of mankind. The kinds of nations and states, the forms of property and the nature of all institutions are neither the blind happenings of chance nor the arbitrary creations of individual wills seeking absolute power. They are rather the realized actualities of philosophies which as ideologies of reason, the mind purposively has striven, through conscious power as means and by synthesis as method, to apply to successive environments.

Socrates over-emphasized mere knowledge as the end of human development, and the panacea of all ills of individual and group life. His fundamentals were: That human happiness is found alone in the human mind; ignorance is the cause of wrongs and evils; and he who knows himself, knows how to avoid the evil, and in such knowledge will do it.

Plato presaged the foundations of Christianity in his conception of the idea of perfection as the end of goodness; for this meant for him not only a life of virtue—wisdom, fortitude, temperance and justice—but a survival of the rational part of man. But this idealism of Plato is marred by his practical political advice that the citizens of his police state, since they exist for it, should be trained primarily for valor in battle; and thus, warfare becomes the fixed status as his idea of human perfection, devoid of any concept of progressive change to higher levels of either the state or the individual.

If the conception of things was characteristic of Socrates and Plato's "idea" supplements the static thing, it is Aristotle's method of reasoning about things that leads to the real meaning and knowledge of the nature of things. This Aristotelian method made the senses the source of knowledge and reality to exist in the mind and not in external things. Aristotle's

statement of causal relations follows from his broad universal of "being" as a condition of change wherein the present actuality is converted into an always potential better status or higher level, the desire for which presupposes its ultimate realization. Rational individual living in a social state ruled by men of mind is the foundation on which the philosophy of Aristotle builds its man of means or balanced sense of proportion, the happy attainment of which is the end and purpose of his being.

One of the strange anomalies in human thought is the long period between the first mind that conceived the unity of nature, and searched for the thread that binds together all processes, laws and principles of energy, and the time when other minds accepted and amplified this synthesis of relations of energies and things as a foundation law of the universe. Comte was the first mind in eighteen centuries to follow Aristotle in his effort to bring all human knowledge into one positive system of philosophy; and it was Lester Ward who first discerned this great contribution of Comte at about the same time Spencer was developing his synthetic philosophy, without acknowledgement of his debt to any who went before him, and Bergson was imitating Ward, as the latter complains.

As the whole of the nineteenth century is characterized by the diffusion of mass education and is outstanding in the development of human freedom of thought and action, so the ending of the eighteenth and the beginning of the nineteenth centuries are momentous in the growth of the human mind in its comprehensiveness of its general laws and in the accuracy of its knowledge of particular things and relations. Many then discerned and all now know the fundamental changes to which those centuries gave birth in the relations of individuals to property, to their government and among themselves; but few then realized or now sense the stupendous revolution that the concept of emergent evolution as a cosmic process—and particularly, its economic, political, and religious implications as theory, doctrine and dogma—have wrought in the minds and relations of men, and will in the future work in the determination of their destinations as individuals, groups and nations.

The aspirations for human perfection may or may not follow a certain plan of divine will to a predestined goal; but it adds nothing to that impenetrable Power, the mind of man cannot comprehend and only may feel, for a creed to avow a revealed plan of individual destiny. Majestic becomes the intelligence and goodness of the creative and ruling Power of the universe that plans not for a particular universe or planet or for every living organism upon our earth crust, but which, at the highest level of sublimest design and in most inclusive purpose, gives to man the Christ concept of a dynamic mind.

It is this mental function that, in truth, creates the pattern of justice it strives to weave in obedience to the cosmic energy of evolutionary change which holds all universes in leash, molds the earth home of man to his uses and impels mankind to always ascending levels of just thought, just action and just relation.

Men differ in their power to read aright the social purposes which their minds continuously evolve, as also varies the sensitiveness of their beings to feel and respond to the patterns of political and economic justice emergent at a particular time. However discerning or sensitive an exceptional mind may be, it is vain beyond measure if, believing itself so attuned to the divine will, it dares presume that such is its knowledge of the woof of an existent and the threads of an emergent pattern of life, it can design a future world that images the divine plan.

Facts unobserved, events not anticipated, new mechanisms invented, old relations changed and other loyalties aroused, accumulate without number through the ages to confirm and illustrate the aphorism that "man proposes, but God disposes" as the drama of human development unfolds; and civilization evolves a more sensitive government responsive to larger segments of mankind for the administration of a more certain and universal justice.

Chapter Two

FORUMS OF JUSTICE

Good and Right as Forums of Justice—

THE GOOD ACT in the meaning of law may not be just or always right; but justice and right in jural concept are identical, since authority defines the act as justice and sanctions it as right, sometimes over the protest of conscience. There are then two forums with different standards of conduct that determine the nature of justice: (1) The good, which emerged when conscience first blamed or pitied individuals in primitive family relations who either inflicted or suffered hurt; and (2) the right, which authority first revealed as the divine will.

During the conscious life of man, his conscience and external authority have guided and judged his conduct in all relations. Man through the ages, in body and mind, has been a martyr to *nature*, that lashed him with its fury, and to *authority*, that bound him with its chains and riveted him to the soil as its serf. Overcoming the terrors of nature and his fears of authority, he became master of himself through his mind and its disciplines of his interests and control of their satisfaction. Turning to his uses the physical laws of his world, he invented the mechanisms of economy for his comfort; and at long last, discerned and gave sanction in custom, law and politics to rules of action for the control of his conduct.

He evolved in the fullness of time the tools for his government and the institutions of his culture. And yesterday, in the supreme effort of the United Nations Organization to outlaw the nations of violence and of war, he promulgated the principles of understanding and conciliation that, in the security of order and peace, should determine the institutions, mold the purposes and direct the justice of his society; and, in the ultimate of human welfare and happiness, must accommodate the relations of individuals, groups and nations to world unity.

Authority as Forum of Justice—

THE CONCEPT OF JUSTICE as authority originated in man's religious nature and was necessary to the security and order of a society ruled by its priests who were also tribal kings. The lowly victims of the wrongs of authority were the first in conscience to doubt the divine right or to question the humanity of a revealed justice that subjected them, in abject helplessness, to its hardships and held them to the status of serfdom by its engendered fears.

Individual conscience through the centuries of man's martyrdom has protested the authority and contested the power of any ruler or state, dominated by any group, institution or organization, which denied to him freedom to determine the just rule and right conduct, even though as citizen or subject he must obey the sovereign's definition of both.

The injustices of life are limited only by the ingenuity of man's cunning in the use of his selfish animal nature to exploit the lowly or to project its baseness upon the strong whose trust is breached or loyalty betrayed.

It serves no purpose to appraise ills or to contrast wrongs; but aside general hatred for the stealth of privilege under law and universal abhorrence of tyranny over the weak, no injustices in human experience in poignancy, scope or duration have inflicted more suffering than enforced adherence to a fixed status in condition or to a relation by authoritarian enforcement of an *absolute*, either as a principle of justice or as a revelation of divinity.

The arresting fact of our civilization is the unending conflicts between authority and freedom as affecting conscience, thought and action. This eternal thinking about liberty and justice, pondering their natures and seeking their purposes, with attendant aspirations to attain their ends as the higher law and by the impersonal and right application of their equalities in the exchange of all values in human relations, is distinctive of the inner-light of man's mind.

Conscience as Forum of Justice—

IT IS THE CREATIVE individual conscience, seeking always for higher standards of morals and of law in satisfaction of our aspirations, that overcomes the wrongs, thwartings and obstacles of authority. In truth, the searchings of conscience for the higher law have made the mind alert to conceive, and its will determined and strong to build the enduring institutions of freedom. So, his aspirations and achieved freedoms have enabled the individual to attain his full stature of worth and dignity in his sensitive response to the eternal call of justice and, as one with other men of character, to become the conscience of society.

We submit to the power of authority and obey the dictates of conscience, because we seek with greatest freedom to conceive and to express ideas, to worship what is deemed sacred and to satisfy wants in self-realization. Our liberties come then neither wholly from us nor to us, but are both innate and conferred. As rights, they are urged or modified by conscience; and as privileges, they are granted or limited by authority. But neither liberties nor rights come to us without attendant and reciprocal obligations.

The similarity of our wishes and the inclination of every man to satisfy a dominant desire common to most individuals leads first to conflicts in denial by some of the right; but finally induces understanding among all seeking the liberty, since it is lost to all who would deny it to others. Human freedom is then an assumption of conduct affecting a thing, individual or relation, which every person may assert in appeasement or in satisfaction of a human vital want, and which is granted or acquiesced in because of sameness of strivings by all individuals within the radius of its influence.

But it is conscience and consequences, and not the authority of rules, that determine the rational life of both freedom and obligation for both the individual and the group. Fixed rules of right and arbitrary cannons of conduct cannot be based on either instincts or feelings, or be formulated as unchangeable principles in morals or in law; and this, since experience depends on the individual organism, its environmental strivings and choice of

interests, and all of these elements vary with different individuals and characters.

The conscious mind, of course, has its innate conception of the good and in subconsciousness must function all the recorded rules of morality which experience has realized in satisfaction of its past purposive aspirations. The *still small voice* that dictates the good to the mind of man must then be concluded as similar in energy and function to *meaning* which the mind gives to its interests and to actions. Both conscience and meaning are the cumulative effects of all past experience of the individual, the results of his past choice of interests and the determinants of his future acts.

Government by Nation-State as Forum of Justice—

IT IS THE AUTHORITY of the state in exercise of its sovereignty that gives formal sanction of acquiescence in a liberty asserted by the individual. But except for favored times and places, it has been the power of the deprived and neglected who in good conscience and with conviction of deep obligation, always under demand of right and sometimes with force, have taken from arbitrary governments the freedoms by them deemed to be the liberties of free men.

The organizations and institutions of government for the security of human freedom have their source in the aspirations of man's mind; and the military genius that plans, and the power of arms that finally achieves government under law in place of absolutism, are often inspired by ideals of justice which conscience and courage implant in the wills of men of noble purpose.

Since Magna Carta, it is the glory of Western civilization that our natural civil rights are by convention of human understanding embodied in a fundamental law of three functions—the legislative, which formulates the rules of control; the judiciary, which interprets their meaning and enforcement; and the executive which enforces and administers. It is the distinction of our nation that its people established their government, ordained their liberties, recognized their reciprocal duties and provided for their perpetuation and the welfare of all through balanced power held in

equilibrium by checks imposed on both the federal and state governments and on the people themselves.

The tritest of generalizations is to ground any discussion of civil liberties under the Federal Constitution on the duality of citizenship under the federal and state governments, the concepts of federal supremacy, of state rights and of liberal or strict construction of the fundamental law in determining the power of the two governments and the liberties of the individual within their respective spheres. Marshall and Taney, the two Chief Justices of longest service, are regarded as exponents of these contrasted theories; and they have opposite approaches to the Constitution and different concepts of fundamental governmental power and individual liberties.

But this classification of constitutional interpretation may be criticized as too rigid and over-simplified, if it ignores that aspect of constitutional law which seeks to give understanding to the extremes of these two constructions and overlooks the great service rendered by the Supreme Court in its constant re-examination of conflicting judicial utterances; and their reconciliation or modification in adapting fundamental law to the discoveries and inventions, that within the last half century have transformed our conception of cosmic energy and changed the nation's trade and commerce, its methods of production and economy and the relations of men in doing the work of the world.

In the changing conditions and relations of life, there can be no faith in representative government, as the best mechanism to reconcile authority with freedom, without an abiding confidence in the higher law as its complement and the ultimate determinant of foundation law, if the individual, in seeking his conception of justice, may not try to prevent the power of a self-serving majority from destroying his inalienable rights or outraging his conscience.

Mankind has aspired and struggled in vain for freedom; and democracy, the apical achievement of its civilization, is but illusion, if by principle of interpretation or application of checks under law mere numbers

cannot be restrained and finally, thwarted from ruling with injustice a government in all vicissitudes limited by a constitution.

The laws of all representative governments, of course, function and prevail, whether enacted by an assembly or found by the judiciary—only so long as public opinion sustains any of them. For Austin and the later-day realists to the contrary, "Law itself is (not) THE standard of justice" FOR ALL TIME, since its rulers may change. Reason and conscience are the eternal and ultimate tests and the figurative advocates of a changing standard of justice, which is the never satisfied aspiration of the higher law. There is no final adjudication of justice without right of appeal; and the decisions and orderings of governments always may be modified or over-ruled by subsequent tribunals of more delicate conscience or for constitutional reasons in justice educed under a higher law from other conditions or new facts.

Civilization as Universal Forum of Justice:

JUSTICE implanted in conscience is hallowed. All other things toss on the waves of time; and the most profound of all human lessons can never go from the consciousness of man—for he has learned that in his mind resides the supreme wisdom and there presides the final judge of human justice. The jurisdiction of civilization's High Court embraces more than governments and their institutions, and rises higher than juridical decrees. He who reads aright the chronicles of man, in the knowledge of his creative aspiration, must look upon world universal society since human history began, as a great forum of justice.

Men and nations have crowded the corridors of this universal tribunal to file the complaints of humanitarianism. Its methods of trial have been not always the application of maxims of equity and the processes of law, but sometimes vengeances and proscriptions, murders and massacres; and its final arbitrament always has been the violences of insurrection, revolution and war. It has issued in blood its writs, has served them with the sword and has executed its final decrees with dynamite and atomic destruction.

The doors of this tribunal of timeless and universal justice never close. Its litigants may die, the victorious may supplant conquered nations, sons may succeed fathers in the inheritance of every wrong that is indicted and punished and of every right that is pleaded, adjudged and vindicated at its bar. But when the inexorable verdicts of its justice at last issue, there are always adjudicated a more humane level of conduct, a more exalted appraisal of the right in government or economy and, under a higher law, a more refined expression of human culture.

The causes decided by this court are momentous in the successive epochal determinations of the one basic and underlying question involved in all crises of the human race. This eternal issue is between the free conscience of a creative mind, expressed in confident self-help, individual freedom and dignity of thought and action, and the continuance of status and dominance of privilege in abject fear of authority.

Here was heard the suit of the freedom of conscience against the authority of creed, of subject against a king, of serf against the lord, of the commoner against privilege, of the black man in bondage against his white master and of free men against the tyranny of a majority in government or of unrestrained self-interest in economy. Here was proclaimed the judgments of arms, that twice have scourged our planet, against the totalitarian domination of the state in economic and political power.

And here now, in peace, is pending for decision by sovereign nations and under a world organization of nations, the nature of the global foundations upon which shall rest future civilization—whether of statism or individualism in production, of community or the private distribution of profits in industry, trade and economy, of autocracy or democracy in government, and of might as the sole determinant of the right in law or of checks on power as the judgments of justice under the limitations of fundamental law.

Universal justice will never let free governments forget that their crushing of the autocracies of authority in Europe, Asia and the Americas imposed the duty on the conquerors to democratize both world economy

and government. When the court of last appeal of civilization pronounced against absolutism in ownership of property or in control by one man or group of the freedoms or the labor of another through force or operation of law, it bound itself to defend and to preserve the right of all free men to govern themselves by self-imposed limitations on power under constitutional law; to investigate the manner in which things may be made under just conditions of intelligent co-ordination and co-operation; to determine the methods by which the products of industry and economy may be distributed for consumption, exchange and sale; and to fix equities in the division of the profits of the joint venture between him who owns, him who manages, him who uses the tools and materials of production and distribution, and him who buys for consumption or use the things made.

V

JUSTICE AND LAWS OF
NATURE, DIVINE AND
HIGHER LAW



Chapter One

JUSTICE AND LAWS OF NATURE

Relation of Laws of Nature to Justice:

WE CANNOT UNDERSTAND either a physical thing or form of life without regarding both as manifestations of nature. Nor can nature be conceived either as a whole or as a static fact, for it is energy always changing in infinite space and endless time. No structure of life can be imaged without thought of its purpose, since all life is a process of growth and development.

The constant effort of our minds through our senses is to observe what is external to us and, perceiving the meaning, to discern the utility of all life and things. But the key to our observations and reflections is the actual use we attribute to or make of them—for we are conscious sensations link mind and matter and that our interests and strivings direct our purposes and determine our actions.

Nature and mind are then indivisible, since each includes the other and life is in continuous transition, with the present growing out of the past and always emerging into a future as molded by the creative mind.

The laws of nature as science are the assumptions of our minds as to the manifestations of energy—the inexorable succession of cause and effect. The nature of law as jurisprudence embraces the less rigid rules of human action, which individual choice voluntarily accepts or rejects. The validity of every generalization of the causal succession of natural events or of rules for just conduct rest with the particular mind that observes the physical event or conceives the human act; and minds differ in the recording precision of their senses, both in the accurate use of mechanical tools which detect and measure things and reactions and in evaluating relations among men and nations.

Our assumptions of both jurisprudence and natural law are then

changing and variable; and their truth cannot be tested by certainty of application to a particular, but must be determined by the calculus of probability—not as absolutes but as relations.

Since there are no laws of nature except as the mind discerns them, first as assumptions and then as verifications by experiment or of experience, it is only a part truth to conclude that any jural principle is an application of a specific law of causality. The laws of energy, whether of matter or of mind, as expressed in a juridical system are in a continuous flux of becoming, and this because our concepts change with relations—with modification of organism and environment.

Law as a relation of life must be written in terms of time economy. It may be considered under the general subjects of political, social and economic action as inclusive of all relations in the production, distribution, ownership and use of material things, in the maintenance of order under governments of law and in the continuance of culture under concepts of duty, rules of right conduct and faiths of religion. The Sphinx still asks the question of man's destiny, but no intelligible sound comes from the recesses of its stones; so, from the bosom of time, comes the never-ending strivings of man's purpose as the only answer to his destiny and governance.

Justice and Energy Process of Interaction and Relation:

MAN, HOWEVER, has observed the foundation fact of a basic energy process, which in the balance of its forces, under the control of his mind, directs his destiny.

This energy as motion, is of the same essence in every phenomenon of nature; and is in continuous succession of conflicts of division or integration which tend always to evolve different but generally larger organizations, through a creative mind, to higher levels of human thought and action and of more just relations.

Science is now engaged in the work of demonstrating the cosmic process of fission and integration to be a pervasive phenomenon of nature. This basic manifestation of energy is not a single elemental substance of a

primordial force in time and space, which causes effects—does things or makes changes. *The energy process is rather motion or the detected effect of two or more integrations which interact.*

Radium, as a single form of matter, does not radiate energy; nor our sun, as a planet, emit it; nor electricity, as one force, give it forth. But the cosmic principle of energy is the relationship and inter-action of the atoms; which consist of integrations of elemental electrons, protons and nuclii that create, and the mesons that cement or hold in equilibrium, the physical, chemical, vital and psychic energies of nature to the *final emergence of mind.*

One must acquiesce in Sir Thomas Browne's conclusion that the human mind is "surely a piece of divinity within us"; but we cannot adopt, with equal assurance, his assumption that mind is "something that was *before the elements.*" And although he avows one "that understands not thus much hath not his * * * first lesson, and is yet to begin the alphabet of man"; we in the knowledge of present science must accept the conception of the energy process—as a cosmic manifestation of relation and inter-action between two or more units of now ninety-four elements—that forms the innumerable inorganic compounds, organic cells and ultimately man of individual creative mind.

And so similarly, law and governance together make the science of human relationships among an incalculable number of individuals or groups; and justice thus becomes the process for conciliating all conflicting interests in the maintenance of equilibrium of all human activities.

It is because the human mind must adapt the individual to his kind, to his groups and to his external environments—thus directing and controlling to great degree the nature of the relations among individuals and between the individual and society—that purpose and not chance dominates all human relationships. This is the sequel even though the universal process of division and combination produces the psychic energy of choice, determinative and directive of both conscious or subconscious purpose,

and also the other chemical, physical or vital energies with which it interacts.

In all manifestations of energy in galaxies, atoms and cells, in human actions and mind processes, and in all political and societal relations, there is order as the result of the colligation of forces or of the cooperation of antithetical energies and creative mind *only* when all forces are in equilibrium and in harmony with the whole unit of integration. Chaos and ruin attend the absence of those checks and balances which dynamic purpose has evolved as the necessary concomitants of order and harmony in the synthesis of all conservative and creative energies within the orbit of the universal forces operating at all levels of cosmic evolution.

Since mind alone wills for the purpose of satisfying human strivings, there can be no objective existence of either law or government without a mind that conceives it, through which it functions and upon which it operates. Law exists only because the mind of man lives and develops and has vitalized human government, as it has created every of its tools for his security and directed the development of his culture. Law and morality are then primarily subjective, for they alone define the relations of men; as mind, in its creative purpose, seeks new levels of culture with change of conditions.

A basic contrast of fact and fancy in determining the nature of knowledge impels the assumption that knowledge is limited to experience as the mind records it through the senses; and our pondering the facts of experience demonstrates the futility of explaining the phenomena of nature on any basis other than the observations and experiments which faith in our minds confirms. The universal principle which attends our mental processes becomes the factual positivism of Comte which has directed general knowledge into its hierarchy of the sciences, every of which has gone through similar stages of thesis, antithesis and synthesis, and is related to the science that precedes and follows it in the development, processes and experiences of the human mind—the highest level of which is its social

aspect and aspiration for justice to the individual and the group and their respective happiness and welfare.

Justice and Law of Cosmic Evolution:

THE PRINCIPLES of right action and the postulates of science, moreover, follow the universal law of cosmic evolution, stem from the same basic processes and result in uniformities of conduct in jurisprudence and of effects in nature. The mind must give meaning to experience as the history of science, of human relations and of events records it. Reason and imagination then give value to experience as aides in the determination of the foundation principles of human conduct; and law is neither experience nor reason, but is rationalized experience.

Our assumptions then fix the nature of the fundamentals of law and determine the principles which rule the relations of men. These assumptions differ with epochal changes. Authority gave definitive meaning to all experience until the sixteenth century conceived this to be the function of individual minds, and the eighteenth century substituted human reason; and so reason finally conceived the ideas of justice and liberty, which ultimately evolved as the foundations of our present understandings of individual freedom and the general welfare.

There are three possible assumptions as the evolutionary sources of law—an external environmental force, the innate dynamic mind, or their inter-action.

The determinism of conditions is expressed in the class theory or economic interpretation of history; the positivist philosophy of the creative energy and ultimate supremacy of the idea of justice is the idealistic ethical concept of positive law; and the postulate that a mind of judgment and of will adapts the external to individual and group well-being is the present conviction which makes neither mind nor environment the sole determinant of law, but assumes it to develop from the inter-action of all forces to positive ends of justice as determined and directed by the wisdom of experience.

Neither the laws of nature nor of man, as they affect him, are the

blind happenings of chance. They are of purpose at the first conscious functioning of the mind, of understanding at its higher levels of jurisprudence and science and of compromise and cooperation as the highest expression of intellect molds and directs human justice.

In discerning the laws of nature and of man as disclosed by experience, the philosophical mind sees identity in the trial and error processes of both the scientist and the jurist; with, however, some significant differences. The scientist instantly rejects the result of disappointing experiment, unless the test itself leads to a new discovery; but the jurist examines the effect of the principle in time action alone, and evaluates it by the experience of the race as it influences human action or as man's behavior evolves the rule. Both the scientist and the sociologist attempt to predict the future relations of things and men by molding the energies of nature and human interests.

But such have been the scientist's precision of instruments, persistence of experiment and revolutionary the application of newly found basic laws of physics and chemistry, that his predictions or readings of the future of mankind are accepted with a degree of certainty in sharp contrast to the crude and too often futile efforts of governments and law to force new patterns of life or relations on either individuals or nations.

There is, moreover, uniformity and likeness of law among peoples and nations under similarity of conditions and of trends. Unless human laws evolve, as does the organism itself, in adaptation to environmental energies without and to man's instinctive organism within, there can be neither human laws nor comparative jurisprudence. Either all law must be of the same general pattern, and similar in kind and form; or it will be so individualized and become so isolated as to produce anarchy or discord.

Realization within the last century and a half has come to man that his ills as an individual and the afflictions of the state can be remedied by the human mind. He now has less faith in status or station and more confidence in his own power so to mold his government as to give free expression to the loyalties which compromise suggests and understanding con-

firms as the bases of a secure and just society. The mind of man and the creative purpose of his life drive him by irrepressible immanent impulse, but with a freedom of will that may or may not be illusory, to increase the harmony of the whole of his society, and, as well, the instrumentalities conducive to its welfare.

Thus, the living together in the affection and security of the family, several families associating together as a clan, clans merging as tribes, tribes uniting as nations and finally, the federation of all nations as one world for the doing of justice to all peoples—are applications of the law of creative synthesis, wherein discordant constituents colligate into a group equilibrium of larger integrated units of increased efficiency and harmony.

The mechanisms which man has invented and improved for the maintenance of group order, the conciliation of conflicts and the composition of individual misunderstandings—as the tools and structures of government, the profit system of economy and the jurisprudence determinative of political, social, moral and religious life—are all illustrations of the universal law that impels discordant and repellent parts to get together in understanding and tolerance to the end of the unity of invention with convention and of synchronizing the functions and relations of life.

Chapter Two

JUSTICE AND SOME FUNDAMENTAL LAWS OF NATURE

Energy as Essence of All Manifestations of Nature:

THE LAWS that hold universes to order and beget continuous life are in broadest concept constant, but the human intellect is not static in its knowledge of either the development or use of physical laws or mental processes. Nor is the mind of man ever satisfied with its mastery of the unpredictable animal within its control. All of mind is in continuous flux, constantly changing with its external contacts and its images of the various manifestations of energy, as it becomes both dynamic and purposive in creating an always more dominant material and ethical force. This mind power utilizes all laws to the better physical adaptation of organisms to environment, the more precise adjustment of desires and satisfactions, the wider diffusion and more equal distribution of the goods of life and, in fine, the more certain administration of justice between nations and among men in closer world unity.

Energy may be defined as matter in the process of change or matter may be described as integrated energy. Both are forces in either actual or potential motion, form or mass and are in everything—are nature. Whether the cosmos is dissipative or regenerative, its energy principle is inseparable from its phenomena of fission, interaction and integration.

Conclusions drawn from collated facts come finally to the statement of a relation, which observation detects or experiment confirms as of fitness and utility, and in accord with all inter-related forces. When the relation is of a uniform sequence of events, a general law is concluded; but

when experiment confirms the causal relation, then principles are evolved in the several domains of knowledge. Increase in the accumulation of facts tends to broaden the application of any generalization; which, however, changes with every new fact observed or demonstrated by experiment. This process of enlarged generalization must continue until finally human knowledge is included in general laws of universal application, but always tested by every new fact found by science and explained by its principles.

The degree of verification of the existence of a law or the validity of a principle differentiates the sciences—which deal with the manifestations of energy as integrated elements and universes—from religion, education, economy and government—which are the interests and institutions of man and compel, mold and control him as an individual or in group association.

Because the interests which impel vital organisms are as various as the impulses of different individuals, we may not expect the same precision in the formulation of the principles that direct the mental processes and govern ethical conduct, as attends the apprehension of the nature of physical or chemical energy. But there are three universal forces that apply alike to all manifestations of energy, as, also, three principles of causality which explain all phenomena of nature and which register our experiences.

Justice and Laws of Change, Fitness and Equilibrium:

THE EXPANSION of the human mind transformed the idea of a fixed into a constantly changing cosmos and enabled it to formulate foundation laws of nature, applicable alike to inorganic and vital energy in universes of greatest expanse as of infinitesimal microcosm. These laws of (1) *change*, *integration* and *fission*, with those of (2) *harmony* and *fitness*, are the essentials of the underlying dogma of evolution. This assumption of the eternal interaction of opposing energies gives first consideration to the aspect of form and disregards both the characteristics and the cause of structural variation as, also, the nature of energy.

The process of cosmic evolution that governs all phenomena within the (3) *equilibrium* of all forms of energy is the universal law of integration by the consolidation of all parts in perpetual but moderating conflict,

wherein imperceptible and infinitesimal particles in greatest diffusion and inefficiency, but in tolerance of variant fitness and fission, progressively emerge in creative synthesis as successive levels of more efficient and harmonious units of organized matter.

This universal law is dynamic in operation, creative and purposive in its effects, with progress its constant concomitant, and perfection its ultimate but unattainable end. It is so exact, constant and powerful in operation and tolerant and adaptive in its ultimate end of fitness as for us in wonder and dawning comprehension, but in neither demonstrated fact nor full understanding, to postulate a purposive energy as the creative force of all levels.

Search has not found a sole element or primary force, but has revealed an energy principle basic of all laws of nature and explanatory of all relations; and so man's efforts to uncover the source of every force have not been utterly futile. Science discloses some intimations of an all pervasive energy of positive and negative polarity which holds in order both the inorganic atom and vital cell; and which splits the atom into its constituents when the balance of its forces is destroyed, and disintegrates the organisms when the cells cease to coordinate.

This cosmic process conceives all nature to be in motion, in time precision and within control of physical attraction and repulsion, of mechanical contraction and expansion and of chemical affinity and repugnance; but to be held to form and in tolerance and place by one dominant force under the laws of equilibrium and integration or to be diffused through space from central suns as cosmic rays or from exploding atoms as fission transmutations of energy.

The cosmic manifestations of fitness, equilibrium and integration constitute the fundamental and eternal foundation of both human government and positive law. Every force of nature and act of the human organism tends to closer organization and to the constancy and order in tolerance and balance of all energies. The state and its government have one fixed tendency and law only one purpose. Governance becomes less individual-

istic and more cooperative in purpose, centralized in power and administrative and bureaucratic in function.

Positive law at the several levels of human development has had many sanctions peculiar to times, places and conditions; but from the beginning of primitive man in association, it has always had one form of constant sanction. This eternal sanction is the consciousness both of the group and of the individual, that the wrongful act of either so disturbs the equilibrium of both the personality of the individual offender and the welfare of the group as that the group, through its tradition, custom or law, and by the force of government in exercise of the power of the state, alone can restore the balance of pre-existing order as the foundation of human justice.

Justice and Laws of Unity, Uniformity and Conservation:

THE OBSERVATION that the heat and light of the sun are stored in all plant and animal life and that its rays are in all energy suggested the universal assumptions of (1) *unity of nature*, and (2) the *uniformity* of all of its manifestations and (3) the *conservation* of energy in both vital organisms and inorganic structures.

An assumption proves nothing, nor does it add certainty to reality or anything except a generalization to our experience. Since these experiences are deduced from memory of past sensations, there are some basic assumptions to which intelligence must give relative constancy, however changeful their aspects or our points of view at different periods—for they involve order, tolerance, relation or continuity.

The atom must be assumed to be both fission and integration of related positive, negative and neutral energies as its minima constituents of the *elements*. Hence, the cosmos as a whole and in all its parts, manifests itself at successive levels of energy in various diffusions and syntheses and in causal relations governed by uniformity of movement.

Every atom is for itself the center of this cosmos, as every individual mind is for its thinking the center of all intelligence; for from both radiate their respective external energies, which in turn are circumscribed and

modified by similar energies of other atoms and other minds in the eternal process of *inter-action*. This inter-action of physical and psychical energies at successive levels educes the fundamental conception that man is subject to the same laws and processes as his external cosmos; and so, impels the basic assumption that in the evolution of the new something of the old level inheres.

The laws of nature, however, are not without paradox, for nature is lavish in its expenditure of energy and yet, conserves it to order, tolerance and balance. Man's profligate waste of the earth's resources is exceeded only by nature's devastations of fire and water; and the prodigality of life is seen in the disorder with which nature scatters its seeds of innumerable species that a few only may germinate, as also, in the abandon with which life is sacrificed that only some of the strong may survive to the continuance of civilization. *Out of this seeming waste and multiplicity, violence and confusion, the human mind for the purpose of saving time, energy or space, conforms the stubborn elements of earth life to economy and fitness and order and to relations of harmony.*

Justice and Laws of Economy, Tolerance and Equality:

OCKAM'S RAZOR principle of parsimony, that "entities should not be multiplied beyond necessities," does more than protest against unsupported conclusions or the acceptance of the less simple of solutions. He in truth announced a fundamental law of life *economy*, which is inclusive of self-defense, self-development and self-realization, as well as supplemental to the physical law of *gravitation* and the organic law of *repetition*. As the law of equilibrium allows its tolerance of variation from the precise standard and as the law of conservation assumes the sequence of the inorganic into the vital, so the laws of parsimony and repetition in economy of life preservation coalesce in the higher vital law of increase in kind which becomes in loftiest expression the universal law of balance in human relations.

This foundation law of *compensation* and *tolerance* in economic and political activities and of *equality* and *justice* under human law in all social

associations, all finders of primitive law, accept in the crude form of "an eye for an eye" as perfect retribution. St. Paul softens this cruel formula into the "reap and sow" simile in paraphrase of the golden rule, wherein the Christ summarizes the wisdom of the East and repeats the admonition of his Hebrew fathers of just balances—symbolized in the scales as human justice and gravened through the centuries in the mind, but not yet enshrined in the heart of man.

The general tendencies, in tolerance and of fitness under fundamental laws of nature, towards integration, equilibrium, economy and compensation mean in fundamentals the organisms of individuals, the organizations of society and the orderly control of the activities of both through individual mastery and group control of conduct. The effort to formulate particular laws of society or of government in addition to these general tendencies has led to the confusion of laws and principles, or more accurately, to the emphasis of some individual traits or group manifestations as corollaries of the above foundation laws.

Thus, Giddings properly stresses the subjective purpose in the social and political activities of the conservative and the liberal; and Munro's law of the pendulum's swing from the centre to conservatism or to radicalism is but public opinion's response to economic cycles or in adaptation to the strains which attend the inequitable distributions of profits. Tarde's imitation of the stronger by the weaker only explains a method by which habit holds society in order. Time has demonstrated the law of population to be the opposite of Maltus' prophecy in his application of the law of repetition; and Buckle in his over-emphasis of geographical environment in the shaping of civilization, but the more confirms the eternally dominant contributions of the creative human mind to the culture and civilization of man.

However, to conclude that the complexity and number of factors involved precludes the formulation of laws of individual and societal development as precise as the laws of physics, is to disregard the fear and confusion with which man through the ages actually has contemplated his universe to his final concept of a cosmos of order ruled by natural laws. Man

ceases to be helpless to the degree he has enabled himself to rule and discipline his will to obey nature; but he can do neither until he knows some things about the physical and human laws, which exact his obedience in return for their material and ethical service to him.

The individual for many years may continue to employ erroneous principles of governmental, economic and social laws; but he has found at last some foundations of social order and human freedom, tolerance and justice which he knows will endure forever, if they are shaped in accordance with eternal natural laws and are directed to the realization of his destiny by his eternal aspiration for justice—a motive of moral power and manifestation of energy as certain and real as atomic fission and integration.

The thread that runs through the modern social and legal thinking is that the present has its roots in the past and that the vital social needs of the present must be met with equal justice, if the state would achieve real individual and social welfare. Its purpose is not to narrate, as such, juristic history, but to consider the modes of thought of the historical school and its derivatives as elements in the present legal science, to appraise their value for instant purposes and to explore the possibilities of other interpretations which the Nineteenth Century historical school rejected or ignored. In its opinion, the correlation of law and sociology resulted in the "socialization of the law," when Comte conceived the derivative relation of law to custom and of both law and sociology as the manifestations of social and political organizations.

This would seem to make the purposive progress of law to be from authority to philosophy and finally to history. Is not this the necessary analysis of minds that prefer not to accept the simpler formula of the great division of past authority and present reason? The historical method is the right use of the preceding centuries and only emphasizes the past experiments in new experience.

Moreover, since change is the law of growth and adaptation, it herein has been suggested that the underlying conflict is not between stability and

change or status and progress, but in ultimate analysis the real problem for solution is between the individual and the group—the willingness of the individual to subject his will, but neither his conscience nor conception of the higher law, to the common-weal, and of the state to recognize the worth and to respect the dignity of man as such and to promote the realization of his personality.

Justice as Synthesis of All Social and Physical Sciences:

IT IS CONCEIVED the unification of positive law and sociology has passed through three distinct stages: (1) The mechanistic level the nineteenth century which deduced interpretations of nature and life from scientific formulas. (2) The determinism of Charles Darwin suggested a biological evaluation; (3) to which Spencer, and particularly Lester Ward, later gave the psychological emphasis to all social relations.

The foundation and elemental aspect of the philosophy of law here urged is that all social and physical sciences, in their synthesis, contribute to the understandings of justice. Civilization will continue its humane progress only so long as all of the sciences contribute to and become parts of the living tissue and moral fibre of the higher law of man and integral with its ideals of justice, as his aspirations for their realization form the mechanism of government.

The general principle of the relation of physics to economy and politics was stated by Bagehot; and Rivers has applied the elements of psychology and McDougal the concept of a group mind to politics. The principles of economy as interpretative of history have been over-emphasized by Marx and with caution applied by Beard in the latter's interpretation of constitutional law; and Pound, Cairns, Timasheff and Ellwood have made sociology their approach to the study of law.

But whatever the lag of the law in attaining for men the higher levels of life and culture, these thinkers finally have forced the makers, finders and interpreters of law to approach all problems of governance and of positive law from historical, biological, sociological and psychological aspects to the end of reaching understandings of tolerance and justice in uni-

fication of all sciences and not as an absolute of any one science, either as deduction or idea.

No aspect of human thought has suffered more from isolated and divisive treatment than law and government, either as philosophy or as institution. At no time as in the present world crisis have the fundamentals which heretofore have governed Western cultures so warped and crumbled. The unification of positive law and the coordination of its principles with institutions may be approached by putting the principles of human conduct in their true bearings with economic facts and societal relations, by analyzing the elements of discipline and control, by realizing the true nature and varieties of sanctions, by determining whether the processes of development are evolutionary or cumulative, by discerning the internal impulses which motivate conduct and by formulating the principles which discriminate between good and evil and between ethics which conceive the good and the law which enforces it.

Justice as Ultimate Purpose of Creative Mind and Highest Expression of Energy:

IT HAS BEEN the purpose of this treatise to give a conception of government and law as determined by cosmic forces in evolution and as molded to the uses of man by his dynamic mind. This philosophy forms the background and leads to the consideration of the challenges that now confront us. It deduces the essence of law not alone from the nature of events in relation, but as well from the nature of man himself as an animal of creative mental processes. It affirms the vital nexus of individual enterprise and striving to a government of laws and not of men for the security, freedom and welfare of the group and the individual.

It accepts the confidence and capacity of every mind to master itself as the fundamental of the governance of all, and regards representative democracy as the only political organization yet devised, under which every mind is free to think, to plan and to achieve its purposive aspirations. It avows the equality of all before and under the law and the exclusion of none from the privileges and duties of self-government. It espouses the

underlying principles of freedom, of privacy and of opportunity to work and to save, to seek and to attain place and to develop a personality.

It questions the truth of all laws as absolutes, as well as doubts the validity of all principles affecting matter or mind as universals or as ultimates. It repudiates as without foundation in experience the infallibility of human reason or finality of any decree of man's justice, or the indispensability of any tribunal for its administration or of any class or group of men or of any man in economy, in industry or in government.

It suggests the solution of compromise and conciliation as the only means of adjustment, and the equitable distribution of profits, either present or deferred, as the essential of those understandings of justice that follow cooperation in relations of joint venture. Finally, it assumes there is a colligation of the laws of nature and of men and, if not a coalescence in unity, a similarity—because they stem from the same evolutionary processes and result in similar uniformities of conduct in morals and jurisprudence as of energy in physical and human nature.

Its idea of justice challenges as contrary to experience the notion that mere economic plenty without more begets individuals of good morals; and it repudiates, because emasculating to mankind, the assumptions that community production for common consumption is the essential of bounteous plenty and that the satisfaction of material wants is the sole creator of ethical values. Men today are free and live in security because, through the centuries, their individual enterprise and pioneer self-help have caused their beings so to develop, with mutual aid and cooperation as their complements, but never yet with one group or any nation as the sole planner of production for common consumption.

Material things have contributed to man's development less as aids than as obstacles to be over-come by his creative mind; and moral levels purposively have evolved as the individual in self-mastery and in heed of his inner voice evoked an always higher law as the standard of his justice against the status of a government or an economic system encrusted with wrongs. Conditions may and do degrade, debase and brutalize; but neither

body satisfactions nor plenty alone, whether produced by individual or state planning, can create in individuals or states the purpose to be just or instill the will to be free.

The mind and conscience of man as molded by his beliefs and all of his interests, and the institutions which direct and cultivate them, determine his personality and measure both his susceptibility to evil influences and the capability to define the quality of his humanity and justice, and to obey their commands. Thus, the fate of the individual and the destiny of civilization may transcend personal choice; but the desire to be let alone in developing his better self, the will to be humane and to have confidence in self, trust in others and faith in the ultimate realization of the aspirations of all men for justice and their purpose to do it, eternally must be his monitors.

Chapter Three

JUSTICE AND DIVINE SOURCE OF HUMAN LAW

God as Creator and Sovereign of the Good—

THERE IS MORE than an illuminative analogy between the modern conception of God as universal energy, of which mind is a manifestation and the individual a part, and Zeno's substance of all things, that comes from the *logos* and to which it returns or of the "reason" conceived by Philo as the "word of God," which was Plato's idea and ties man to God. Thus, is discerned God, the good that directs and is all things. Saint Augustine substitutes God for Plato's idea, Bruno and Spinoza make a God of the universe in which all things change and become; and Wordsworth discerns as God:

" * * * * a spirit, that impels
All thinking things, all objects of
all thought,
And rolls through all things."

It is of small pragmatic significance to the human mind to conceive God as a personality or as a spirit that directs thought and gives meaning to all things or as the total of all forces of good, without some realization of the effect of such conceptions on individual character. Man, it is suggested, may find God as an actual force in the molding of human personality and in doing the will of humanitarianism, by the deification of everlasting justice as creator of its aspirations in every human heart.

This concept of the ultimate sovereignty of universal good leads to the acceptance of the divine source of law, since in accord with the understandings of men through all times; and it induces the correlated idea of a Magna Carta that stems from the laws of nature and bears the seal of

the God of righteousness and of justice. Nature gives to every human being the right and means to live in the security of order, in personal freedom and privacy, and in peace of mind and realization of personality promoted by equal laws and consummated by just governance; but it also imposes on him the obligation of self-help for his development and the duty of mutual aid for the general welfare.

Divine Source of Justice Under Law:

IT IS A PROFOUND TRUTH observed by one of the Founders of the American nation and of its Constitution that although states are the work of man, he is the creature of the "all-perfect Creator." Under guidance then of the God of nations and of men, three great ideas moved the intellect in the evolution of the Constitution of the United States as the first formal declaration, by man himself in contra-distinction to authority imposed, in human history of the rights of man, the duties of a state and their reciprocal limitations.

It is in (1) the Christ concept of both a *spiritual and a temporal sovereign* whose authorities are not in conflict that man found deliverance from autocratic power. This escape of the slave world from absolute authority in the idea of a spiritual sovereignty led naturally to (2) the acceptance of a *higher law*, which is binding upon all because of its self-evident truth and clear sanction in the human conscience. And the assumption of the existence of aspirations for justice because obviously in accord with the understandings of all men, logically induced (3) the correlated conviction of *the rights of man* and his obligations under natural law.

It was these foundation concepts of human relations that crystallized first in religious associations as ecclesiastical compacts. In imitative secular organizations, they later became a part of the fundamental laws of the colonies; then of the Declaration of Independence, as the demand for freedom; and finally, of the Federal Constitution as the mechanism of just governance; with its Bill of Rights and subsequent amendments as the spirit and aspiration of humanism; and are now creeping into the world conscience of mankind as a united nations organization.

Little reflection will disclose that only the first of the above ideas may be accepted in broadest application. The human mind always measures things, relations and men with a spiritual standard of the right and of the good that transcends secular authority. This realm of justice for individuals and of welfare for the group is the kingdom of goodness or of God which is in the mind and heart of every man and must be kept separate from the secular authority, else the power of this latter sovereignty directs the right and restrains the wrong to the extinction of the individual will.

But who finally shall determine the rule of a higher moral law is a question so pregnant of truth and justice as to make its answer the determinant of the nature of human law. For when the judge or tribunal is named, the law ceases to have a sanction in nature and instead becomes a positive declaration of the government designated tribunal, making it either judge-made or legislatively enacted rules of conduct or rescript of autocracy or decree of dictator.

Moreover, how can man have any fixed rights if he is of eternally creative mind and society is in continuous change? A dynamic purposive individual mind makes necessary the assumption of a progressively developing society wherein the individual may be subordinated to the general will; and thus, the welfare of the group limits individual freedom and the liberties of one are restrained by those of other individuals, with resultant obligations and attendant duties.

Rights and Duties Under Higher Law:

THIS DIVERSITY OF OPINION as to the nature of man and the function of his mind gives rise to the differences between rights and duties and the consequent conflicts as to the nature of the state and its relation to the individual. Divergent ideas of these relations, of the functions of the state and of its purposive ends, manifest themselves immediately as meaning is given to the written words of a promulgated foundation law. Implicit in a Constitution lies the fundamental issue that forever has divided men in their use of this mechanism of governance for the control of their strivings—the rights of the individual and the duties of the state.

Individualism and statism is the deep line division between the parties contending for power; for property possessions as contrasted with human rights, of capitalism with communism, of democracy with dictatorship, are but designations of particulars. The life of the nation in all its aspects, forms and relations—the liberties of the individual, the welfare of the group and the purposive emergence of always higher levels of human rights and state duties—changes as the eternal pendulum of goodness, duty and right swings between the individual and the state.

Both the state and the individual are forever seeking to plumb the justice of Harrington's equilibrium and to fix in individual conduct and state action that tolerance of diversities in individual traits and of conflicts in human interests which does not resent opposition to the deepest and most sensitive of our loyalties.

Two mental processes determine group governance—(1) individual personality and (2) the course of societal development. The human differs from the animal mind in that the latter exists and moves alone in space, but the mind of man masters space by both natural and artificial means and makes time his slave by remembering and giving meaning to his past experiences.

His present is lighted by its inherited wisdom and his imagination pictures the future from accumulated memories and the achievements of the present. As the individual or the state either clings to the wisdom of the past or is inspired by an imaged future purpose, the character of the former is developed and the destinies of both are determined.

The memory of our experiences and the aspirations of our purposes then presage and give meaning to the future of man and his society. We thus value and measure the things that make life real and mind earnest more in terms of the past and present, and as conservatives cling to the old and are guided by experience; or we seek the image of the new, and as liberals strive and aspire to achieve its realization. Attitudes of mind then determine the foundations of legal, political and societal theory; and give either strict or liberal meaning to the words of a formal declaration of,

what for the time is deemed to be, essential human rights and of the duties of states.

The passion for justice is the sublimest of man's emotions and his most delicate and elevating aspiration. That the sense of justice is innate and censors both animal behavior and human conduct is confirmed by our casual observation of the dog's slinking tread or the slap of its young by its corrective paw, as well as by the admonitions of the human conscience. While justice is always invoked to restore to balance a disturbed status, yet the motive that impels human justice may be the moral duty to give another his due, either of censure or praise, or of punishment or reward, as well as our demand for the satisfaction of what we deem to be our rights—to do as we would be done by.

Justice then as emotion, aspiration and idea emanates not alone from the assertion of the egotistic notion of the inherent rights of man, but also partakes of the obligations of individuals and of states under the law of nature. Indeed, the relation of the classical concepts of the law of nature to the reciprocal rights and duties of man and of nations as currently re-examined and debated at conferences of allied nations is so intimate as to suggest the assumption that the instant promulgations are the development of the higher law.

And they warrant the faith that justice has its roots in divine purpose and human nature to the end that duties shall be defined and performed, the rights of individuals and nations shall be enforced and vindicated and the wants and needs of both the constituent and the group shall be evolved, harmonized and realized over larger areas and at always ascending levels of their happiness and welfare.

Chapter Four

JUSTICE AND HIGHER LAW

Aspiration for Justice as Higher Law:

HOWEVER ACERB the often vacuous discussion relative to the reality of a law of nature as an aspect of law, none may doubt the existence of a higher law as a persuasive factor in the determination of justice as both a standard and the ultimate of law—whether positive, divine or of nature. The realist and positivist, in their pragmatic avowal of the dogma of force, regard sanction of the state's power as the only essential of law. But this sole criterion of positive law ignores and takes from the law that actually governs men, all consideration of the vital elements of its source, nature and purpose.

Law has three human sources and performs as many functions and services: (1) The need of man for a life of self-realization, (2) the order of society for his security and (3) the aspiration for justice in all relations of his life development.

The principles of justice are the moral motives, and its postulates are the means, that mold the form and define the nature of substantive and procedural law, in the prescriptions of the needs and interests of mankind. And in satisfaction of these needs and of this eternal seeking of the human mind for justice, the constant purposes of law are: The formulation and enforcement of rules of action for the preservation of life and its dignity, the ownership and use of property and the defense of freedom, privacy and tolerance by the maintenance of equality in the right of the individual to have rights appertaining to and affecting his relations with his family, group, nation and the world organization of nations.

The restricting of the science of law solely to sovereign control or power, creates the state absolute master of the individual and inevitably leads to the totalitarian force that regiments him. It makes the violences of

the tyrant—despot, autocracy, or the majority of a day—override the experience of the race, ignores reason and personality and silences the conscience of mankind and the moral purpose of every man. The concept of law or idea of a life philosophy that strips man of all inalienable rights, even the right to have rights, only sends the human mind to its “broken cisterns”; while from “treasure depths below, fed by the skyey shower,” the wisdom and power of inherent, eternal and divine aspirations for human justice are “welling bubbling forth, unseen, incessantly.”

When we accept the aspiration for justice as the higher law that enables us to discern the good and to enlist and corral all of nature within and without us to do the right, we then may recognize the dynamic power, and can realize the moral force, of the justice under law that dominates all relations, and is the ultimate determinant of human actions at all ascending levels of humanitarianism.

This coalescence of the aspiration for justice in the higher law of moral power should remove the positivist's fundamental objections to the existence of a law of nature articulate within it; and should change his conception of the higher law as a standard of justice. For natural law is not definitive of a fixed status or a constant relation; it is not an unchangeable code of rules applicable to concrete things or conditions; nor is it the realist's dogma for the pragmatic use of a day to do world justice. These are the assumed characteristics and imputed functions of positive law, but are not inclusive of all the purposes or foundations of the law that man has evolved for his governance.

Interests alone have moved man to self-regarding behavior; and he has developed as his mind at successive stages has adapted himself and moulded nature to the satisfaction of his wants. His first emotion and eternal want is the continuance in life of his body; and the second level is the conscious satisfaction in self-interest of his body needs and mind aspirations. This latter stage is always purposive and prudential; and involves the choice of moral values, e.g., self-serving interest in possible injustice to others, or enlightened self-interest in just regard of other's desires.

When men realize the competitions of worthy interests and concede that the good of others merits the same recognition as their own, they then rise to the higher law of impersonal moral worth that subordinates the good of one to the welfare of all in similar interest; and justice thus assumes its eternal attributes of aspiration, conciliation and harmony.

This aspiration for justice is then the higher law of enlightened self-interest that everlastingly promotes man's societal development by tapping continuously the exhaustless reservoir of his moral reserve power—the law of nature. It is this law that attends, criticizes and supplements man's constant upward striving for certainty in the formulation and enforcement of his positive law under adequate sanctions; and it is always evoked when man moves forward to higher levels of governance in the attainment of his equality of rights and justice in all changing conditions, relations and associations of individuals and nations.

Chapter Five

HIGHER LAW AND JUSTICE AS ASPECTS OF MELIORISM

Meliorism and Freedom:

THE BASIC IDEA of a full life is its forward looking aspect; and meliorism is the dominant, directive and creative power of the mind in its search for justice through conciliation of human conflicts and competitions. Man's mind embraces both evil and good forces and adapts all life and things to the satisfaction of his interests; it molds character as personal choice wills right action within the limitations of environment; it organizes individuals into families, groups, nations and united nations as a whole for the unity, security and welfare of humanity; and it seeks equality of conditions and of rights under law for the enrichment of every personality as a constituent of universal society.

Freedom in the utilization of all things and forces that an individual may deem within the scope of his activity, is the essential evolved by his dynamic mind for his development and the means of satisfying its cravings for equity in all relations of private enterprise. The supreme goals of individual worth are: That freedom be denied to none and so preserved for all, and that every person be let alone in realization of the personal self—not for the lone individual in anarchic isolation, but for him in inter-relation with all members of society for the good of all.

The end of all strivings is the attainment of a calm attitude of mind that seeks liberty and respects repose, searches for clear understandings and evokes the choice of right purposes. It imposes the restraint of tolerance on conflicts and inculcates the duty of fitness in thought and of justice in ideals of action, which aspire for realization in idea and achieve-

ment. Thus, the miracle sequel of dreams made real is exemplified in spiral ascending experience.

*Jesus discerned, in the apparent conflicts of Caesar and God, obligation as the supplement of our loyalty to both. As in all relations, we should accept cooperation as the complement of competition, compose our conflicts and act in cooperation for the larger freedom of every part of society, so Lord Acton expresses a fundamental relation in the observation that: "When Christ said, 'render unto Caesar the rights that are Caesar's and to God the things that are God's' those words * * * gave to the civil power, under the protection of conscience a sacredness it never had enjoyed, * * * and they were the repudiation of absolutism and the inauguration of freedom."*

Meliorism and Confidence:

HOWEVER NECESSARY it may be as a standard in the determination of civil and religious liberty, *confidence* in the dignity and personal worth of the individual and in the highest ideals and obligations of his mind to attain ever ascending levels of truth and justice, is the most elemental and vital of all moral values. Without this attitude of mind, every standard of worth is of no practical use, all values become worthless, and man is a mere fleck of cosmic dust.

We must believe in the eternal and pragmatic values of truth, goodness and duty, as well as dream of them; for it is only to the degree our faith in them and our confidence in ourselves and trust in our fellows are deep and earnest, that the ideals of our strivings will be realized.

But the real use-value of confidence is that it takes from man, in his inclination for ease, his tendency to have an over-faith in the practical and human scheme of things, itself to correct the wrongs and evil things of life; and so places the final responsibility for justice under law and for changes and reforms in government in the moral fibre of the individual himself for decisive action in the peril of their loss and in the emergency of a crisis.

Meliorism, Reason and Religion:

REASON neither formulates the natural law nor rejects its sanctions. Postulating a justice that transcends the interests of any individual, group or nation, reason assumes the sanctions of the law of nature as the moral imperatives of mankind. This immanent aspiration for justice stresses an objective order of the good and right as conceived by conscience; and so ordains and imposes on every man the duty of right choice and just action in the attainment of social order and individual worth.

Positive law is divisive and emphasizes individual freedom; but the law of nature comprehends both the constituent and the group and, uniting anarchic personalities in a common life of justice and humanism, gives to every individual full opportunity freely to develop. The rational foundation concept of natural law is then of an aspiration for and tendency towards the dynamic development of the moral nature of mankind to always higher levels of justice.

It may be assumed that although neither God nor Christianity in explicit words is in our fundamental law, both concepts are the marrow and bone of the polity of the American people. Our courts, in realization of their great contribution to civilization, have made both an omnipotent Creator and the greatest of Teachers the fundamentals of American law—for whatever is a standard of comparison in judicial judgment is a part of that law, whether positive or of nature.

There is, however, another consideration which makes impossible the exclusion of either God or Christianity from our fundamental law. Webster uttered irrefutable logic when he said: "No man has a right to set up * * * his own conscience as above the law." And yet the nation did not accept its truth as applied to slavery; because rebellion of the individual conscience against the status of stubborn authority is the only means of attaining the higher levels of justice that have contributed to human development.

There is a higher law than the logic of reason or the formal word of law as ordained in constitutions, found in decisions or enacted in statutes.

Statesmen of wisdom and of good purpose regard as supplemental to every formal promulgation of positive law an unwritten amendment, which defines its interpretation and determines its enforcement in the terms and meaning of the law of nature. This emendation of all law is the conscience or moral level of the people who are to live under it.

The Father and Lawgiver idea, which Moses gave to his people and Jesus taught to all, is the highest conception of God as good-will and the ivory white heights of moral purpose as justice. Here then is disclosed the most delicate and difficult decision that confronts the individual in his determination of, and aspiration for, the foundation and enduring value of life—since it involves loyalties and duties, rights and obligations and, properly regarded, a freedom of choice in our strivings that makes sacred a double and not a divided duty.

Chapter Six

HIGHER LAW AS STANDARD OF RELIGIOUS FREEDOM

Religious Freedom Under Foundation Law:

THE VITAL PRINCIPLE of liberty is restraint; indeed when two or more persons are in association, there can be no liberty for one without the restraint of all. Liberty and limitation are the complements of human action and societal association. It is because the human mind cannot control its beliefs, that the individual should be free to entertain and avow any religious conviction or ethical concept not inimical to the security of the state, or "to the peace, good order and morals of society." Diversity of opinion is as pronounced as differences of physical characteristics and of mental traits—a consideration which makes freedom of thought the necessity of human liberty.

These truths were of slow acceptance by the human race; and their denial through the centuries of martyrdom was punished by inhumanities that the zealotry of religious bigotry alone could inspire. It is only since the revolutionary age of reason and the rights of man that governments ceased in their efforts to impose the creeds of a state religion, gave to man as his right the freedom of worship and ordained the separation of church and state. So fixed and literal is this inhibition that the Supreme Court has just stricken down, on petition of an atheist, a regulation that used public funds for teaching biblical lessons in the public schools.

The formal promulgations of this now fundamental American religious freedom are the First Amendment to the Federal Constitution under which it is protected against invasion by the nation, and the Fourteenth Amendment which saves it from violation by the several states. Religion is not defined in the Constitution nor do the amendments explain the na-

ture of the religious belief which they protect. The Court, however, has made clear that the liberty guaranteed does not include the right to act or refuse to act on religious grounds because alone of conscientious religious convictions. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

The courts may not determine the sincerity of a religious belief or test by any standard the protestations of individual conscience. Both the legislature and the courts, however, in the proper exercise of the power of the state to secure the continuance of its government, to maintain order and to enforce laws essential to the public health and morals and for the protection of property and all constitutional guarantees, may decide whether a challenged religious conviction in fact imperils the security of the state, or offends the law enacted in exercise of its police power or denies individual civil rights, equally sacred as the avowal of a religious conviction.

The test then of religious freedom under the Federal Constitution is not wholly the conscience of the protestant, neither his right to be wrong nor the wisdom of the act commanded or condemned, nor the futile psychology that would exact reverence against the will; but rather and alone is the mandatory fiat of the state that the act prescribed or prohibited by statute is essential to the continuity of its sovereignty and safety or to the peace and welfare of its citizens.

Search discloses no instance where a nation has renounced or disavowed its power to exact from its citizens acts or words deemed by it essential to its security or the common welfare. Without its analogue in American law, a divided Court, while avowing constitutional power and not policy is the polar star of the judicial function and in reversal of its profound decision of a few years prior, now denies that a legislative mandate is in reality essential to the preservation of the state, unless disobedience to the words or acts therein prescribed disclose *an instant peril to the nation.*

In the balancing of the certain goods which result from inculcating

pride in the culture, achievements and destiny of the nation and reverence for its traditions of liberty and the works of its founders, the judicial choice is now against the nation's power to use, for its safety, methods and symbols employed by every ideology in the history of man to educe loyalty and inspire faith in its purpose. The courts must now prevent possible hurt to one conscience, which, as another suggests, if multiplied many times would reduce government to a gesture and the nation to impotence.

Contribution of Religion to Higher Law:

THE CONTRIBUTION of religion to the higher law of civilization have been through two distinct streams of order and faith; of conformity and of dissent; and of authority, which exacts obedience to ritual and seeks to impose belief by formula, and of freedom, which rebels against worship under state-ordained creeds and seeks for liberty to believe as the mind impels in its search for right relations with the Absolute.

The Early Church in apostolic succession, to its communicants, is the survival of the first Christian organization which came into being, as the shepherd of the weak, the outcast and the slave, during the period of transition of pagan Rome from the Republic to the Empire; and has been throughout its entire history the minister of the lowly, the protector of the poor and the conservator of order.

But the processes of the human mind must finally prevail against man-made conventions and assumptions. All men do not have the same beliefs; and neither will nor force nor authority, against conscience that interprets and is the law of nature, can compel belief or prevent dissent from creeds of religion, however established. James I could "harry them out of the land," but he could not "make them conform"; nor could he foresee the sequel of his futile efforts to drive the Puritans to conformity. They founded a nation on the inhospitable rocks of a continent across a sea; and Charles, the son of James, went to the block in England's violent protest against the tyranny of authority in religious worship.

Two criticisms of Christianity have tended to influence some concepts of the higher law that emerged from its principles and practices: (1) The

authoritarian zealotry and heresy-hunting of its schisms and its religious wars have blotted Europe with the blood of its martyrs and have so seared the minds of men with fanaticism, that intolerance continues still to warp the conscience and to confuse it with prejudice; and (2) a philosophy of life based on the dominion of the strong conceives Christianity as growing out of the weakness of men.

But all great Western religious movements having arisen out of the sorrows, sufferings and wrongs of the lowly, Buddha, Moses, Mohammed and Jesus and all of their disciples have but expressed their strivings for the favors of grace and happiness in their aspirations for the eternal verities of justice in all human relations.

Jesus as Archetype and Conscience as Foundation of Higher Law:

THERE IS, HOWEVER, one contribution to the religious development of man that no criticism of Christianity or of any religion can impair; and from which flows the admonitory challenge of the higher law. This human experience is not so much rebellion against authority in the government of political and religious organizations or of a demand for freedom of worship, but rather lies in the divination of the true meaning and significance of the life and teachings of the Christ.

The Quaker dissent was fundamentally of the mind; and while it had emotional appeal that produced its martyrs, it was not a protest against either political or economic conditions—although prompted and formed by both. In a religious world “pleading for sin and imperfection” and which denied to man all power of self-improvement, Fox discerned, as had Paul the Lawyer-Apostle, the divinity of the Teacher in his life and urged the acceptance of his moral precepts as the means of creating in every man the dynamic power to strive to develop a similar personality.

Thus, religion was rationalized when Jesus was made the archetype of man; and his attitude of mind was transformed from the despondent complex of the consequences of original sin to the concept of personal worth and purposive strivings for individual perfectability and group improvement. And, finally, was inculcated the now accepted fundamental of

religious experience and the foundation of the higher law of nature: That belief and worship are for an individual mind to determine and not for the state to impose; for no law of the state can exempt the individual from the consequences, or relieve him of his personal responsibility to follow his "inner light" or take from him that right—because deemed his duty.

However uncertain or nebulous this higher law of nature may seem to the realist who sees force for control alone as law, its moral and spiritual essence are here urged as the essential aspect and foundation of justice under law in intimate association with political, economic and religious experience—for it follows the "still small voice" of the conscience of man in the choice of interests which his dynamic mind impels to ever higher levels of humanism.

Chapter Seven

SPECIFIC LIMITATIONS ON HIGHER LAW

Prescript Against Ex Parte Tribunal:

FUNDAMENTAL LIMITATIONS of universal acceptance attend the realization of the aspiration for justice in the change of concepts of moral law into the law of nature, with sanctions enforceable by the state. These foundation prescriptions for the assurance of a just *higher law* are the prohibitions: (1) against an *ex parte* tribunal, (2) against *ex post facto* law, and (3) against the taking of private property for other than a public use.

(1) Society has imposed as a foundation condition to the transmutation of rules of morality to legal principles, that only a *competent and impartial tribunal* can either formulate or apply as natural law man's passion for justice. An *ex parte* tribunal of good and unbiased minds may offend judicial process as much as a neutral court of incompetent or prejudiced personnel. For a devout desire to be fair cannot supply the inability to determine what is just; nor can the biased mind free itself completely of pre-conceived convictions, however sincere the effort to do so. And the effect is injurious to the suitor and degrading to the public, if a tribunal of incompetent judges, or of inefficiency in function, destroys its only purpose to exist.

Neither court nor judge has any claim to public service unless both so do justice that the defeated suitor leaves their presence, satisfied his cause fully has been heard; and then, only if the people as the supreme censor and court of last appeal, have no cause to suspect either a not qualified mind has fouled, or lack of integrity has corrupted, the judicial process; or that a partisan or prejudiced tribunal has misjudged the controversy.

(2) Prescript Against Punishment Under Ex Post Facto Law:

INVENTIONS eliminative of time and space and world conventions of trade, religions and government are fast silencing Kipling's divisive doggerel that "East is East and West is West and never the twain shall meet." In no sphere of human activity is the tendency towards one world more manifest than in the strivings for universal justice. Nor is it better exemplified than in the effort of the East to abolish absolutism in the conception of law and the administration of its justice. The distinctive thing of Western culture is its persistent strivings for freedom and justice—the former is realized in its idea of democracy, and the latter in its aspiration for limitations on individual or group absolute authority and the overreachings of power.

The abolition of the power of authority to define an act as a crime and to punish the offender contemporaneously with accusation is the one contribution of Western law to world justice. No modern mind doubted until yester year, that the "no man shall be condemned" by *ex post facto* law of Magna Carta and the similar explicit prohibitions in the fundamental law of every free people, had forever driven from the minds of men the vengeances of despots, the cruel proscriptions of war conquerors and the hypocritical pretences of the zealot's retaliations in the clashings of creeds.

That justice demands punishment of either superior or subordinate officials for the wanton violation of the rules of war, as promulgated by conventions of nations, condemnatory of offenses proscribed by the moral sentiment of mankind, is no warrant for hanging individuals guilty of offenses or wrongs not yet denounced as criminal by any constituted national or international authority.

The victims will die as martyrs; the people of vanquished nations may see in their executed leaders the victors' crime against justice; and the just among the conquerors must contemplate with seared consciences their misgivings of this atavistic revival of horrid revenge, and join with the neutral opinion of mankind in execrating the probable continuance of its proscriptions.

However precise or punctilious the judicial process, no group of conqueror nations under an assumed higher law may arrogate to itself—whatever its right in the ethics of victory to hold the vanquished nation under a mandate or in military necessity to destroy it—without hazard of retributive condemnation by the moral judgment of a later day, to punish the rulers or leaders as individuals for wrongs which are made crimes only when an indictment is found pursuant to a retroactive agreement among the conqueror nations.

Neither the atrocity of the offense, nor however ruthless its perpetrator nor clear his guilt, justifies exception to this fundamental of criminal procedure; and when put to the final test of forbearance, the most lamentable commentary of just minds, yet to be born, on our civilization may be its failure to attain this level of justice. Crimes in the name of civilization, but in conceded violation of the legal foundations ordained by Western democracies are still the tragedies of man's search for political and societal justice; and with what pathos is recalled Roland's lament of crimes committed in the name of liberty.

Aggressive War Made Crime After Indictment:

THE GENERALLY ACCEPTED OPINION is that the conscience of mankind long since had barred punishment for acts not authoritatively defined as crimes. Whether the hazard of personal, racial or religious vengeance in prosecutions for *ex post facto* offenses be remote or near, it was to prevent the possibility of such accusations, so monstrously motivated, that induced their prohibition by the fundamental law of Western nations following the only revolutions of violence in Anglo-American history.

Who is so assured of the righteousness of the Nuremberg convictions as to hope the people of Germany sometime will be convinced, or that some of the prosecution nations will never doubt, that the crime of "aggressive warfare" was so clearly defined by any tribunal, prior to the Paris Pact of 1939 and the Declaration of Berlin of 1945, as to enable impersonal justice to punish it as a crime or to differentiate between national responsibility and individual culpability?

No reference has been made to any international covenant that specifically condemns this offense as criminal. It became a capital crime "against humanity" when the indictment charged Nazi leaders with war acts so labeled. In justification of this anomalous procedure, two analogies are urged and an assumption is indulged, which a sensitive conscience repel—the former because it is convenient and the latter as arbitrary.

Admitting no prior explicit condemnation of the crime as charged, the prosecution contended: (a) Aggressive warfare is not different from the war crimes specifically defined in the 1917 Hague Convention—e.g., killing enemy civilians, or at prohibited times, or by condemned means, or in such numbers of one race, as to exterminate it; or (b) like early common law crime first defined when punished, there may be retroactive accusation, under a primitive international criminal law, of a war offense not condemned as criminal when committed.

Let him who accepts the good will protestations of groups or the treaty declarations of nations against the then common practice of all expanding or aggressive nations as of the same legal sanction as a conventional international prohibition of specifically defined crimes, set forth the constituent elements of the crime of aggressive warfare to the satisfaction of his reason and with the certainty that warrant indicting the accused.

The failure to meet this test of a prosecution free of vengeance will not avoid the related task of naming the essential factors that segregate the chiefs of the nation who have schemed, as aggressive criminals, for personal plunder from those leaders who, in performance of duty as civil and military experts and loyal patriots, did what their governments in war ordered in defense or for the safety of their nation and to have refused to do so would have named them as traitors.

And yet, if this distinction capriciously be ignored as the basis of either precedent or retroactive recognition of the guilt of national leaders, how can be evaded the conviction that a partisan tribunal has condemned as criminals, those arbitrarily accused, in disregard of individual criminal intent and in violation of that foundation of Western criminal justice

which always has differentiated between crimes of nations and by individuals and never, by treaty or code, has punished a citizen or leader for the wrongs of his government?

None familiar with the United States Constitution, whose one explicit prohibition affecting our criminal processes is against punishment by retroactive law, can urge the Nuremberg indictment was *legal* under American criminal procedure, either in the crimes charged or persons accused. It can be defended as *just* under the facade of a higher law only by the acceptance of a trite assumption of relative moral values not capable of demonstration; and which always has been invoked by power in extenuation of authority and absolutism.

This abused and subjunctive expedient of ruthless proscriptions under legal forms pleads in extenuation, but not in justification: That *if* the moral obliquity had not been indulged, or the legal wrong had not been done, consequences the more to be deplored might have followed.

But with the abandonment of civilization's only prescript for protecting the individual against arbitrary accusation and with his highest contribution to criminal justice flaunted, what matters the tribunal or methods, however ruthless, of some other unauthorized prosecution, if the dire consequence of all prosecutions violative of *ex post facto* prohibition makes certain that those arbitrarily accused are hanged?

The desire or determination to punish crime, however it outrages humanity, may ignore the legal procedure with which justice through the ages has protected society against the outlaw and its own retaliatory passions; but only at the risk of mocking civilization's achievement, or of exposing mankind to the detestable pretense of seeking vengeance under the hypocritical pretext of finding a higher law.

Moreover, is not this assumed passion for certainty of punishment a complete reversal of the moral values for which man strives and justice seeks in its criminal process? Vengeance is Bible admonition against the revenge of barbarians; civilized peoples punish only to safeguard society; law never seeks for victims, but aims only to reform the offender and deter

others; and proof of a crime beyond reasonable doubt and a presumption of innocence are the axiomatic foundations of justice not to protect the guilty, but that no innocent man shall suffer.

The individual and the state each has a character to develop alone through the restraints imposed upon instant retaliation for wrongs suffered. No public or private delinquency is more to be deplored than for an individual or government of a nation deliberately to breach or to ignore a self-imposed rule of action in its effort to attain more just relations and higher levels of moral controls.

When society finally became the sole prosecutor, individual revenge was condemned as a crime; and the problem of society was to define the crime, fix the guilt and punish the culprit. The nature of the crime is the most vital of these elements—for there can be no just prosecution, unless an impersonal and neutral tribunal makes certain its essentials, free of the victim's sense of wrong or desire for retaliation.

This does not require either initial precision or continuity of the same definition of the crime, since exemplification of subsequent adjudications will give fuller and more exact meaning to the offense. But it does mean that a retroactive verdict of guilt for war crimes is but, and expresses only, the power to avenge; until the victors by formal promulgation declare their purpose themselves to submit to the higher law by them evoked in peace after the event.

Whatever the doubt or differences as to the necessity of exacting the death penalty in order to sustain world confidence in international declarations against the aggressive wars of nations or their leaders, none can question that universal justice now demands, and the call of humanity never will be satisfied, until the United Nations, or some international organization, formally and explicitly makes its proclamation that both nations and individuals, or either, may be punished as outlaws for specific war crimes against either a world society or its constituent nations and peoples. Then only will be restored to its erstwhile vigor the fundamental of Western civilization—and so will be made universal the one eternal

foundation of universal justice—that no one shall be punished for an act unless condemned as a crime by a prior positive law under constitutional sanctions of a state or organization of nations.

(3) *Prescript Against Taking Private Property for Private Use:*

SINCE THE NATURE and control of the ownership and use of things by the state or the individual are for the security of both, all conflicts of property among individuals or between individual development and group welfare must be reconciled. The state, however, is the dominant sovereignty which functions for its defense and preservation; and so, fundamental law must give to government absolute power over the person and property of the individual. Governments then must have absolute power to take from the individual his private property for any public use under its right of eminent domain and for the common weal under its police and tax powers.

Sargon, the conqueror of Babylon, decreed compensation for all private lands taken for public use; but in the absence of an inhibition under the fundamental law that created the nation, a sovereign government may expropriate for its uses property without compensation to its individual owner. This power of eminent domain no democratic government has exercised except in the emergency of its instant security; and the constitutions of the United States government and of every of its states explicitly prohibit the Federal or state government to take for public use private property without just compensation. The obvious corollaries of this fundamental inhibition are that the property of one individual may not by law be given to another person for his private use with or without compensation; that the courts of the land are the final arbiters of both the purpose and nature of the taking and use, as well as the reasonableness of the compensation awarded; and consequently, may declare void an offending statutory taking of private property for private use or a taking without any or an inadequate compensation.

Jurisdiction, however, over lands so acquired, "as in cases of acquisition by purchase without consent of the state, * * * is dependent upon ces-

sion by the state and the state may qualify its cession by reservations not inconsistent with the governmental uses."

Although this affirmative power of government is most essential to the development of a nation's natural resources, the building of its means of communication, the defense of the nation and the expression and expansion of its natural energies, yet it must be assumed that because the power of eminent domain is so great and touches so vitally the happiness and well-being of the citizens in the things that to them are vital, the necessities and welfare of the state alone should invoke and a delicate justice should attend its exercise.

VI

JUSTICE, HUMAN
INTERESTS AND
POSITIVE LAW



Chapter One

JUSTICE AND SELF-INTEREST AS ELEMENT OF HUMAN LAW

Enlightened Self-Interest and Freedom as Conditions of Justice:

LIFE MUST SO CONTINUE that freedom can remove the hinderances as self-interest appraises the conditions under which the individual acts in pursuit of his happiness and for the welfare of the group. Only experience can determine the wisdom of personal choice or motive evaluate its adaptation to environment; and thus, character measures the consequences of conduct and finally, decides the nature of human culture. Character then so molds the habits of the individual, embeds itself in the customs and laws of the group and directs public opinion as to determine finally the welfare of all.

Public opinion, however, changes as new conditions evolve new customs and laws, with the character of a new generation to judge social conduct and to direct the tendencies of a dynamic society; and hence there must be some unchangeable criterion that prompts the choice of right action and forms the patterns of true welfare. This test of right individual motive or standard of just social conduct cannot be a self-regarding absolute—selfishness; nor is it to be found only in generally accepted altruism. No person can care for the wants of the individual better than himself; and it is as degrading for a normal man to hope the state, or to wish another person, will supply his needs, as it is inane to expect an individual, except in heroic sacrifice, will prefer another's life or welfare to the continuance of his own security and happiness.

Why should not both individual and societal welfare result as well from one's concern of self as for some other person or for the group, if performance of the self-regarding conduct injures no one? Thus, intelligent self-interest, enlightened and restrained by the obligations of mutual

aid and limited by the duty to helpless dependency, is the measure of altruism; and there is no rule of conduct or standard of welfare that can ignore the primary duty of every individual to give heed to the satisfaction of his needs and desires and to his own defense and development.

The admonition of Jesus is duty to the group, to self and to others as measured by their helplessness and by the wish of their treatment of us. Whose conduct is more anti-social—he who neglects his primary duties of self-help and mutual aid, and in favoring others becomes indifferent to self; or one who in self-preservation strives for the full realization of his personality as one of a group seeking his development in the welfare of all? There can be but one answer, if sacrifice of self for the salvation of humanity is the attribute alone of divinity and if society is the expression of and reflects its units.

One must give to the society of which he is a part all that in justice is required of every constituent for his security and its safety and the commonweal. But whatever his will to serve, one cannot give much help to another who has neglected and weakened himself; and so the whole cannot supply the deficiencies or delinquencies of its individual units.

Liberty is the essential condition which conduces to welfare; and indeed, it is difficult to conceive of the impairment of individual freedom in any of its essential phases without the attendant loss of both individual character and group welfare. This conclusion stands, notwithstanding the insidious suggestion that would excuse absolutism in government by the plea of its necessity to maintain either order or welfare or both.

Individual freedom is life's essential principle of justice when it gives consideration to all human interests; but becomes a right only when it submits to control, and is so limited as not to be tempted to aggression. Regulated freedom, however, may be driven to use force, and violence may become necessary, in defense of the foundation rights of life, property, belief and a fit environment; which in intelligent self-interest, it defines as human justice and conserves by the ultimate sanctions of power.

Justice and self-interest, moreover, are inter-dependent and concur-

rent. Thus self-interest is neither just nor enlightened unless it embraces and regards all interests other than of self; and so gives and diffuses to all the best that is within everyone of thought and conduct. The function of justice is then not limited either to the satisfying of self-interest or to the refraining from impairment of the interests of others; but rather is so to reconcile all differences as to give an accord and satisfaction to the essential essence of every interest within the orbit of conflict.

However, in acceptance and adaptation of Vattel, this foundation right of natural self-interest implies an obligation to give; and imposes the reciprocal duty of mutual aid and trust: That every individual and nation must do for others everything their necessities require and each should trust all to act for the general welfare without, however, neglecting the antecedent duty owed to the individual unit. Justice then is neither selfness nor altruism alone, however enlightened either may be; but is both a receiving and a giving of satisfactions in compromise, to the end of conciliation.

And so a higher aspiration of universal aspect is substituted for diverse desires and interests, the reciprocity of give and receive requites all selfish conflicts as self-interest in satiety of receiving overflows in the pleasure of giving; and human compensations as positive law reward the just, but punish the anti-social conduct.

Animal Propensities and Self-Interest:

THE REASONS which make the human equation so vital in the competitive capitalism, "under which the United States has attained the largest measure of * * * economic welfare enjoyed by any people in the world," are that the profit system is an essential part of capitalism and both are the material expressions of basic processes of the human mind in their functional control of human conduct.

These processes variously have been summarized and here will be repeated from the less frequently emphasized viewpoint of the transformation of animal propensities into intelligent self-interest, which is the foundation factor of choice, capitalism and profit.

The inclination of the intellectual is to attribute the wrongs and sufferings of humanity to the immaturity of individual minds of the masses or to their failure to attain the maximal limits of a certain level of mental development at a given time; which, however, has been attained by a few select minds. It is then assumed: (1) All mankind is divisible into the two mind levels of the matured fit and immature unfit, (2) that these groups are in constant conflict and (3) that the many of the unfit level have always been exploited by the autocratic fittest or aristocratic best minds.

The error of this postulate lies not only in its arbitrarily ignoring degrees of maturity within the assumed levels, as well as that the consequent levels of intelligence are so variant as to make impossible the determination of any practical standard of maturity; but it also places its emphasis of differentiation on the attainment of a matured mind rather than on the genesis of man's growth from a pre-human ancestry.

The injustices and inequalities, the intolerances, exploitations and wrongs of political and economic life of both the group and the individual are the sequels of the failure or neglect of society to realize that man is an animal influenced by selfish propensities which, the individual failing, the government must control and transform into desires disciplined by intelligent will. The animal survivals are the biological causes and societal beginnings of all competitions, conflicts and misunderstandings among individuals and the eternal causes of war.

It is then to the degree animal propensities are deciplined by the individual or controlled by the state and are meliorated by intelligent choice and just self-interest that man becomes less egotistic and more altruistic, less autocratic and more democratic, less competitive and more cooperative, less the immature victim of his own fears and helplessness and more the mature courageous master of the purposive destination of himself, his nation and his civilization.

The foundation facts that rule society, as units and as a whole, and mold the principles of its fundamental law, then are men's primordial animal nature and his physical struggle to survive, the supremacy of mind,

the freedom of intelligent choice and the final dominance of mutual trust in the determination of enlightened self-interest as the universal determinants of justice and culture in all the conflicts of human interests and relations.

Continuity of Purposive Self-Interest:

THE RECORDED GROWTH of man through the ages discloses that his mind has so dominated and directed his life as to give to it continuity of purposive development at successively higher levels; and confirms his faith in the capacity of the individual units and of society as a whole always to strive for and to attain ever ascending levels. There is within the mind of man something that drives both the individual and the great society finally to prudential choosings of those sound values that endure, since they partake of goodness and tend towards justice.

This does not mean animal propensities are in continuous process of elimination, without sometime mind retrogression; but rather, that in all animal nature there is the potential of remedial good, in all competition the need of cooperation, in all injustice the zeal for justice and in all controversies and disputes the search for understanding.

Finally, in all conflicts and struggles between man's animal nature and mind aspirations, the history of the race demonstrates the existence of a group intelligence and confirms the reality of an individual purpose that gives to every man confidence in his mental capacity and a moral sufficiency adequate for any situation; which the state implements with its sovereign power, because of the diversity of interests and choosings at different levels of individual development. However perverse, or anti-social his rebellious conduct, there is the confidence of humanity in, and an eternal striving for, individual improvement and the irrepressible certainty of the supremacy of the forces of justice.

This confident faith in the aspirations of the human mind and in the achievements of the race are not Utopian dreams; but the past in truth gives assurance of their continuous realization, so long as free men are moved to action by intelligent choice and a mutual aid and trust restrain

an over-reaching self-interest. Such just self-interest is the only basis of profit, the genesis of which is mind; and material surplus is the beginning of property, which is the foundation of civilization alone because all men in common have the purpose severally to conserve the things for which every of them has struggled and sacrificed.

The consciousness of ownership and pride of a stake in productive capital are substantial guaranties against destructive violence and the sure incentives to the just distribution of its profits. Conversely, since we value alone what interests us and care only for what we sacrifice something, it is but human reaction to have small interest in an economy of capital or its conservation in times of stress, if the great body of workers are without property or hope of its ownership and mistrust dominates the relations of men.

Chapter Two

JUSTICE AND HUMAN INTERESTS

Dual Aspects of Human Interests:

THE ACHIEVEMENTS and predictions of all the sciences as they affect life and its relations lead up to and are coordinated in the judgments of justice. Material progress follows the development of the resources of nature; and security in the order of society, amelioration of physical conditions and diffusion of cultural influences must attend the administration of positive law, if justice is to be realized in human affairs. That the creative and right interests and wants of all kinds and conditions of men everywhere should be satisfied is the eternal aspiration of man and the achievement of his justice.

This is then the concern and pragmatic function of law; and the manner and degree to which its mechanism of government satisfies the needs of society as a whole and the wants of individual interests in particular is the test of the nature of positive law and of the kind of justice it evolves.

Science is amoral; but law and its justice are of dual scientific and moral aspects, and of neither alone. Both the scientists and the jurists in application of economy and sociology attempt to predict the future relations of things by adapting the resources of nature and shaping human interests to their particular uses and by creating societal institutions for their special purposes.

But such has been the precision of the scientist and revolutionary the results of his persistent experimentation, and so utilitarian and illuminative the applications of his new basic assumptions and currently detected phenomena of all the sciences, that the distinctive characteristic of their development is the accuracy and certainty of their predictions. And this in

utter contrast to the crude and often futile efforts of law, and its instrumentalities of government and politics, to predict future social or political or economic structures or to compel individuals or groups to accept new patterns of life, organizations and relations.

Nor should it be assumed that, under the dogma of cosmic emergent evolution, predictions in the processes of law and justice ever can attain the precision of physics and chemistry; and this because material things can be detected and measured as constants, but the dynamic mind, as creative of life development and of political and societal change, is in continuous flux. While this variable precludes laboratory methods of experimental science; yet mind is the instrumentality creative of intelligent planning through positive law that is impersonal, universal and relatively certain in its application of moral precepts to the patterns of political and economic engineering as they affect human interests and their conflicts.

The scientific aspect of law stresses the order and security of society; but its moral phase seeks the satisfaction of the maximum human interests, with the least frictions and frustrations to the individual, and the greatest social utilitarianism, by keeping in equilibrium the conflicts of individuals and groups. Such conflicts, however, can be neither held in balance nor resolved without reference to the welfare of society as a whole and a toleration of the claims of individuals and groups in interaction.

These interests are nonetheless directive and dominant as moral forces of justice even though they may interact at different levels of individual or group conflicts, or are opposed to the existent public policy or the assumed safety of society or to the asserted dignity and supremacy of the state, or because one dominant interest, as a principle, may evaluate dependent claims.

Nor is it necessary, in order to sustain the concept of the moral aspect of law, either to postulate an ideal group or society for its definition of justice in human governance, or to assume that the individual is endowed with natural rights which positive law dares not ignore without denial of

justice. For there is in every mind some magnet-like attraction for the good that rejects the evil and seeks for justice in all relations.

Thus is conceived a moral universe as constant and fixed in human conscience and action as are the forces of interaction, integration and fission in the cosmic order of energy, of which the aspirations for justice in the mind of the individual and for order in society are the supreme manifestations.

Human Interests as Determinants of Justice:

THE VITAL WANTS of the physical man are few but imperious. He must be free to beget and defend life and to be let alone in the satisfying of his creature comforts. The human mind, however, is both conservative in the satisfaction of body needs and creative of exacting and compelling interests. In wonder and with curiosity, man seeks to know himself and to understand the causes of energy and the nature of his relations to its manifestations, as motion, thing and life. In prudence and with purposive choice, he strives for ease and culture; and with persistence in his search for freedom and equality, and for tolerance and happiness attendant upon the development and realization of his personality, he eternally demands justice—since to submit to injustice is to share its guilt.

Behavior for the most part is mere repetition, but the mind seeks with its expanding intelligence for something new in satisfaction of its curiosity without limit. There can be neither observation nor attention nor memory without curiosity, nor curiosity without aroused interest; and we give meaning and concentrate our efforts to accomplish that which interests us. Our wants, strivings and aspirations are then our material life interests; and these, together with the relations incidental to their achievement, become as human conduct the real pragmatic subjects and matters of positive law.

But the various individuals, groups and nations differ as to what they conceive to be their distinctive needs and peculiar interests. So also, they disagree as to the nature of the meaning of their satisfactions. It thus becomes the primary function of law in understanding and compromise to

soften the struggles of life, to reconcile its conflicting interests, needs and wants and to equate their values to the end of individual, social and universal justice.

The mind directs the movements of the human body and of the hormones within it, gives to every individual a distinctive image of the cosmos and of his relations to it. Language enabled men to compare their crude ideas of reality and of relations, and thus knowledge resulted and is made permanent by the written word. The cumulative experiences of generations added to the store of observations, increased the sensitiveness of intelligence, gave precision and breadth to generalization and culminated in the conception of an orderly universe governed by inexorable laws.

These laws are found and adapted by the human mind to the transformation of the individual of instinct and impelling habit to the man of dignity and judgment. His intelligence discerns the meaning of every crisis of human experience, person or group; and, if necessary in meeting it, he easily defines the new rule of individual conduct or finds the right principle of government for the state, with always clearer apprehension of the good and more sensitive appreciation of justice.

The value of a new rule of law as justice, of course, must be tested by the instant reaction of our interests to its ethical appeal; but the real criterion of its claim to our obedience is the kind of act which it prohibits as wrong and imposes as a duty and the nature of the behavior it induces. In short, the difference that the principle of law makes in the life conduct of the individual or the group it touches is the final test of our obedience.

The scientist seeks facts; and in detecting new relations adds to achievement, enlarges the field of knowledge and widens the horizon of human purpose. Scholars are endowed with a learning that is adequate and a culture that assures the disinterested and never-ending search for the fullest development of individual worth and group welfare. The just man, whatever his intellectual capacity or attainment, however, is more than a mere seeker for some concrete thing of whatever utility its use. His primary concern is man as a human being; and the source and nature of

his justice lie in the wisdom with which he chooses his interests and the facility with which he invents, and his skillful use of, the delicate mechanisms that detect values and measure all human relations in economy and governance.

The facts of knowledge and the purposes of culture provide the bases of analysis and reflection, but neither gives understanding to the nature of human behavior nor eliminates choice in judging the good act. Conduct as an offer accepted by society, creates a contractual obligation; and the relation, as of parent and child, imposes a duty. It is when we perform our obligations to the state and our duties to our fellows that reciprocal rights are satisfied as among individuals; and the good becomes the right and just act, because it is sanctioned by the state as the responsible representative of society.

Governments, however, are the creations and instrumentalities of public opinion and in the formulation of general rules of economy and polity, man is controlled by the constant fear of offending the group mind; and, of course, he cannot ignore his experience as embodied and expressed in the group customs which molded his life.

Thus, arises and is justified the confidence that government is necessary for security and welfare of both the group and the individual; that its rules of individual conduct and of group and individual inter-relations are righteous; that such rules as just laws must be obeyed by every individual; that such obedience can be enforced only by the sanctions defined by the state; and that with the government, as the instrumentality of the state, reposes the power to enforce the sanctions prescribed, the statutes enacted and the law as adjudged and as construed by the judiciary as human justice.

Dominant Human Interests as Justice:

SINCE WE ARE CONCERNED only with our ideas of things and their relations and meanings to us, it serves no purpose to discuss the possibility of things existing apart from the mind that conceives them. Value as an aspect of reality is reflected by our interest in the phases of that which comes in con-

tact with our minds through our senses. These interests are aroused and persist as our desires are stimulated by our emotional drives or by the pull of our imaginations. Interests and desires are all of one meaning and express the idea of an unsatisfied emotion or a longing for an imagined satisfaction. We value that which interests us to the degree we desire the satisfaction of our emotions either as experienced by the organism or as imagined by our minds.

All interests are those of the individual, and must be asserted by and for him; and while it is not possible by abstract reasoning to determine the relative values of human interests, yet for all purposes of law, it must be assumed the foundation of all our interests is the preservation of life.

The most essential factors that contribute to this vital necessity and purpose are: The security which permits life to continue in privacy; without restraint of mind or body; and with justice in all relations as it affects the conservation, ownership and disposal of property, the continuance of individual enterprise, the development of family life and community welfare and the realization of human personality. It is, finally, the duty and function of government to provide for the defense, promotion and satisfaction of these fundamental interests.

There would be no need for either government or law if no offender injured the person or family or the property of another; and there can be no wrong or damage to either without disturbance to the emotions of both the aggressor and the victim. Since vengeful retaliation is the immediate reparation of injury, which but enlarges the circumference of violence, and there can be no understanding while the actors are under the emotional strain of the consequences of the wrongful act, it is the duty of society to delay judging the conflicting interests until passions have cooled. The judgment then passed by an impersonal tribunal free from the interests that provoked the emotional conflicts, should make certain a decree that not only persuades the actors an unbiased judge fairly has decided the issue, but that also restores equilibrium to their relations and to the disturbed social order.

Human Institutions as Determinants of Just Interests:

GOVERNMENT then is the power that maintains the security and the peace of society; and law is the machinery which it invents for these purposes, consisting of standards of justice which measure the interests of individual conduct and relations, and of the instrumentalities which define, apply and enforce the rules of human action.

Ideas are the expression of man's nature and they in turn determine his future. Man then makes his own tools with which to mold his own destination both as an individual and as a member of a group. His mind is the spirit of curiosity and of knowledge, of interests, of determination and of civilization.

Now if it were not for these impulses which have ever driven him to satisfy his interests, to improve the efficiency of his body and mind, to know more of his nature, to master better his body and to control more fully the destiny of his soul, there would be neither religion nor science nor economy nor politics, the four great spheres of man's mental effort and physical work.

As his choice of interests determines the nature of the acts controlling the development of individual character, so the foundation principles which govern the forms and uses of group organizations are their interests and the realization of the wants stimulated by such interests. The interests which impel organization are as various as the impulses of different individuals; but in content they may be divided, in the large, into four classes which constitute the dominant purposive institutions of man and his civilization: (1) The political, (2) economic, (3) religious and (4) educational.

The consideration of these dominant interests of man and of his institutions for their control should be prefaced by some discussion of government as the mechanism that measures their moral values and, in justice, equates the material consequences of their inter-relation and application to human affairs.

VII

JUSTICE AND POLITICAL
ANTITHESES IN HUMAN
INTERESTS



Chapter One

JUSTICE AND GOVERNANCE AS DETERMINANTS OF HUMAN INTERESTS

Nature and Contribution of Governance to Justice:

SINCE THERE can be neither personal freedom nor character without self-discipline, the purposes of group association are individual restraint, social order, and the general welfare. Individuals absolutely free or in uncontrolled groups is anarchy, and an association without limitations upon its power is tyranny. Personal good and freedom must then be reconciled with social welfare and the security of order. Individuals in association have created the tool of government for the purpose of maintaining the equilibrium of prescribed limitations imposed on both the individual and the group for the fulfillment of the justice they have in common.

Government so evolved for the control of all relations of life inspires man's faith in the just performance of its functions, for it is the mechanism of his self-development and the tangible achievement of his reverence for and confidence in himself. Since it is directed by human minds with cross-currents of human interests as various as its individual constituents, government is more than moving mechanical parts—*being justice under law in such action as subjects the animal nature of man to his mind.*

Government is concerned alone with the inter-action of human minds in association and with their relation to other things within the orbit of their control; and law is fundamentally and intrinsically dominated by ethical values, for the purpose of all human relations is the well-being of man. There can be no law without its basis of good to the individual and the group; and the force of its sanctions is proportionate to its contribution

to the welfare of both. The good which government gives to society or to its individual units is measured by the satisfaction of individual desires and social interests which are fulfilled under it.

Utility and justice direct the operation of governments, the works of individuals and the functions of both; but it is not the whole truth for Bentham to assert their only "common object is happiness." The real pragmatic tests of the value of law, and of government as its formulator and administrator, is that both develop the good individual and promote the general welfare. There can be neither good individuals nor conciliatory groups, unless they obey conscience in performance of the duty of submission to the will of government. Nor can a government be good which does not evaluate human interests with wisdom, and in all its functions give to the individual the realization of justice as the ultimate good of life—for, says Aristotle, "political good is justice * * * the interest of all."

Moreover, organized society did not just happen to develop man's more efficient control of both external nature and of his own self. The function of the human mind has been the adaptation of organism to environment by the dual processes of bending to man's use the external forces of nature and his purposive striving to subjugate his animal nature by restraining its anti-social impulses. The whole conscious history of human development, individual and social, confirms the progressive evolution of human character by the disciplines of dynamic purpose, the creative energies of mind, and of an increasing coordination of groups by the organization of their social aspirations for justice.

Government can function only through persons; and individuals may attain control of government or government can enforce its power either by (1) the violence of force or (2) the persuasion of reason. The fundamental problem then of governmental power and of individuals seeking to direct it, without the use of violence, is so to appeal to the moral sense of every individual as to give to him the idea of justice under law instead of violence in disregard of order. It is superficial to assume that since struggle implies strength, the power of government is seized always by prepon-

derating numbers or by the most assertive or aggressive individuals or groups.

There is a vigor of mind and force of right that ultimately control men by rules of conduct and lead them through self-mastery to higher levels of freedom. Governments of free men are ruled and laws are formulated by minds of moral power whose strength comes from restraints and inhibitions imposed by individuals on their own lower propensities.

Intelligence and character govern all societies whose people want to be free; for individual liberty is the power of mind over the animal, and no state can be free whose government is not controlled by self-imposed limitations, any more than an individual can be free without self-mastery. Totalitarian governments are necessarily of violence and invade every phase of individual thought, aspect of individual enterprise, purpose of personal striving and interest that motivates human conduct.

The fundamental difference then in governments, as among individuals, is the nature of the limitations which each imposes on conduct and power; and the real distinction between a free and an arbitrary government is the purpose of those who control its functions in the satisfactions of their social interests. If these interests favor a group or a class, the rule of government is the tyranny of privilege and arbitrary power; but in a democracy, the principle of government is the good and the welfare interest of all as men, promoted by the choice of free wills, operating through dominant instrumentalities and within limited spheres of action and defined power.

Justice as Control by the People of Differences and Antitheses:

COMTE IS RECOGNIZED, in the growth of all the sciences during the last centuries, as one of the most original and creative of thinkers. He was the first to conceive the fundamental fact of their development in a definite order and to point out that at a given time one science is more advanced in its study of specialized phenomena than the science which follows it. He, however, did not emphasize, if he clearly discerned, that the evolution of the sciences follows the broad general concept of the emergence of

the new from the old with retention of some of its characteristics. Hence the correlation of the sciences as outlined by him must be restated and amplified, if we are clearly to understand the genesis and appreciate the all-inclusive nature and real significance of the evolution of justice under and as the ultimate of law.

Mathematics is applied to no specific aspect of energy in any particular material form, but is the symbolical expression of all relations of form or motion; physics measures the forces of structure and movement, but ignores the compositions of integrations which result from them; chemistry employs the motions of integration and fission to determine the elements and their transmutations, but excludes life from its experiments with primary forces; biology seeks the source of living protoplasm by the application of physical laws and of chemical research to the vital cell, but regards the organism as a growth without reference to its dynamic nature; psychology gives its attention to man as a purposive organism controlled and directed by a creative mind to the realization of the individual as such, but not as a member of a group; and sociology deals with the conduct of individuals as constituents of groups, with reciprocal rights and duties, but with neither plan nor structure nor sanction for the government of a secure society and the resolving of human interests through the administration of justice under law.

Government under law, however, contrasts statism and individualism; the state as despot with the individual free man, who rules himself; and the freedom of representative democracy with autocratic power. Justice in economy opposes the struggle of workers of mind and muscle as masters of their lives in free enterprise against a totalitarian state in sole control of all sources of their livelihood. And in the ownership of things, justice grounds the preservation of private property and a system of capitalism, on the sharing of profits under equitable principles of incentive taxation against confiscatory taxation in communistic re-distribution of the nation's wealth to the emasculation of the initiative of all its workers and to the waste of the surplus of industry.

Modern democracy is blind to the individual differences which are conspicuously characteristic of men. Ancient cultures conceived human differences as of divine creation and early law discerned and adopted them—master and slave, king and subject, priest and communicant; but the distinctive development of positive law is the degree to which, through the years, it has ignored or blunted the asperities of differences. Western law regards all mature and competent adults as uniform units of the group and treats them the same, notwithstanding profound differences of body, mind and moral development. It guarantees to all the same basic protections of life, liberty and property, since the state imposes legal duties and penalties upon all as individual free agents.

These mental and ethical differences, however, explain the diversity of choice in men's interests and consequent variety of action in their expression of personal freedom and of individual and group security. Only idealistic dreamers suggest either the possibility or wisdom of eliminating individual differences as an aid to freedom or security; but experience detects likenesses common to all men amidst multiplicity of differences, and the reason of man brings order from confusion by postulating his laws for freedom and security on the similitudes that exist in human wants, choices and conduct.

Justice as Solution of Mankind's Universal Problem:

RECALLING the polarity and yet harmony of the basic forces of evolution, the duality of man's nature, the primary contrasts of physical nature and the asperities of conflicts between the individual and the group, it may be assumed the problem of the universes of matter and of mind is, and all their reactions and relations well may said to be, the maintenance in equilibrium of antitheses or of opposed forces.

If the concern of government is the control of the animal and mind natures of man and of the individual and the group, this can be done by the supine submission of the governed to authority, or by the will of the rulers subduing the rebellious to obedience or by understandings between the two forces, whereby an equilibrium of group and of individual duties

and rights will be maintained through the consent and voluntary concession of each. The first method of control, of course, is slavery, the second is despotism and the third is democracy.

The governments of the North American states were founded on the laws and governments of England and France, whose colonies they were; but the distinctive thing of both the colonies and the states is their freedom from any oppressive feudal survivals or monarchial abuses resulting from status or the existence of any privileged classes in either their political or economic relations. And this because the pioneers of American civilization were individuals whose primary purpose was to seek the freedom of all the people in self-government, security in self-protection, property in self-effort and justice in tribunals and under law administered by judges created by them.

The nature and functions of government may be regarded from the three aspects of: The source of its sanctions, the performance of its functions and the purpose of its power. Two words and the change of three prepositions express the American fundamental concept of government that revolutionized political and economic thought: The constitution of the United States ordained the people as the source of all authority and government, its functions are performed *by* all people or their representatives and its purposive end is *for* the people, their justice, security and welfare.

These functional aspects of government are not the inferred conclusions of theory or the repetitions of tradition or the assumptions of history. They are the lessons of the experience of a race, which the wisdom of its leaders has embodied as eternal truths in fundamental law for the governance of the individual, the family, the nation and the organization of nations.

The assumption of classes in society was the natural concept of the people of Europe, since their existence for centuries was the experience of status, station and submission. The error of Marx, as avowed and made real by Lenin and Stalin, then is not his postulate of the existence of classes; but the unwarranted assertion that all governments in human his-

tory have come from or change with the violent upheaval of a particular class in its effort, by blood purge, to liquidate the group of creative mind workers of individual initiative and enterprise, and so to seize control of governments for class aggrandizement, and not for the security and welfare of all the people, who in truth are the source of all governmental authority; as the conscience of mankind is the ultimate arbiter of human justice.

An antithetical approach should be made to the consideration of the dominant human interests, which are in constant flux and continuous conflict. For opposed to every individual right or advantage growing out of these several interests, there are personal correlated obligations owed to society and group tendencies or considerations that must be reconciled in mutual trust and under moral truths determined by reason, made real by the positive law of government and enforced by its sanctions. Government (1) in its resolving of political interests, must protect individual freedom against statism; (2) in economic needs, individual enterprise must be saved from Marxism; (3) in religious faiths, individual belief must prevail over authority; and (4) in educational cultures, individual personality must be developed and preserved as against group dominance.

Chapter Two

SOME POLITICAL ANTITHESES IN HUMAN INTERESTS

Political-State and Individual Freedom:

THE CULTURAL and political planes of civilization are few and the distinctive ideal of each expresses the nature of man's chief need for governance at the time of its emergence. Since security is the foundation of civilization and liberty and order are in necessary conflict, the anarchic individual by discipline must free himself of animal survivals; the outlaw must be coerced to order; the free man of family, for his own good, must be molded into a citizen of the state; and the state must function as a nation finally to become a constituent of the world organization.

Individualism and statism are then naturally contrasting governmental theories; and no culture has ever satisfactorily answered to what degree the state may limit individual action for the preservation of group order. The history of political action consequently is embraced within the constant conflict of these opposed policies and activities, and each expresses the ideal or purpose of a period in the political development of Western cultures.

Egyptian stability, Grecian harmony, Athenian liberty, Roman law and order, medieval unity, renascent nationalism, revolutionary rights of man, political freedom under constitutional government, representative democracy, modern totalitarian communism, present-day socialistic statism and the instant universalism of religious and world organization of nations are dominant ideals which have swung or now move the ponderous pendulum of the state in mass action.

The primary essential of a primitive civilization is stability; and hence sacerdotal authority, abject fear and rigid castes characterized the early river civilizations of North Africa and were as fixed as the layers of the pyramids. The sun, air and vistas of mountain heights gave to the Greek the most restless, aspiring and creative mental life of any ancient people; and from their search for harmony and individual freedom have come the universal strivings for symmetry in art, character in man and the aspirations of ideality and for balance in all personal and group relations. Greece symbolizes the struggle against disorder and despotism; and Athens in that struggle was its monitor, because the Athenians called no man their master. They believed the foundation of individual liberty is the right of every citizen to be let alone; and his reciprocal duty is to mind his own business and of all citizens to safeguard the business of the city.

Although the Athenian was free to follow his art and develop his thought, yet he existed for the state; and the essential element of his freedom was obedience to its laws in the development of his personality. Athenian liberty produced intellects unexcelled in the history of human culture so long as the Athenian subjected, in law obedience, his lower to his higher instincts. But disobedience to law leads to individual license, and the refusal of Athens to give to her allies what she believed most essential for her citizens finally destroyed liberty for the Athenians themselves; and thus, the pendulum swung from the individual to the group as the dominant force of state action.

The contrasting gift of Rome to civilization is the conservation of order under law. The individual is the spirit of change, the group expresses the principle of permanence by clinging to the old traditions and customs. Individual action and group order are complementary, since the latter cannot be maintained without limiting the former or the former indulged without disturbing the latter.

The struggle to survive and magnanimity in victory transformed the Roman tribes into a Republic and an Empire of conquerors resulted, with dominion over the ancient world. Rome instead of denying her culture and

liberty to her barbarians, reversed the colonial policy of Greece and united, under her conception of order, the tribes of Italy with the countries her arms had conquered. Roman unity and order followed her legions and, instead of tribal discord, there was planted Roman law; and later was diffused the culture of both Greece and Rome, which nurtured new universal principles of right and imposed another duty on man.

This new relation between the citizens of Rome, her subject peoples and her allies made the Roman the first of all men to realize the duty to keep the order of the group, in contrast to order imposed from above on a people who never realized their interest in the order maintained; and so gave to mankind a real feeling of brotherhood in the unity of peoples and among states. But as, in Greece, Athenian liberty became license and the tyranny of the oligarchy; and then both colonies and barbarians, having absorbed order, began to covet her power.

Growing out of the enforcement of order under law, Rome's real contribution to universal culture is a system of legal concepts consisting of reciprocal rights and duties of the individual and of the state enforceable by its sanctions. The distinctive characteristic of this positive law is its acceptance of the law of nature—the law that makes or finds all law and which, in its aspiration for justice, mollifies and supplements the cruder civil and harsher criminal codes.

The Romans absorbed this higher moral law of nature from the Greek Stoics, who accepted it as the universal conscience of experience; and which human law continuously since then has assumed as a common conscience of mankind that manifests itself as the eternal aspiration for justice, as defined by the higher law at ever ascending levels of human development.

Church-State and Individual Freedom:

THE GREAT CHURCH'S ADOPTION of the Roman law as the foundation of its temporal power and the secular kings' reliance on its principles in justification of their pretensions to political supremacy explain the wide diffusion of the Roman law after her political dominion had passed.

Both pagan and Christian accepted slavery because they determined, as members of the group, that order must be maintained. When, however, the philosophy of self-interest sought to justify the master's ownership of slaves, the difference was recognized between the self-interest which regards only self and ignores others in similar interest, and concretely, between mastery by ownership of slaves and the subjection of beasts by command and of tools by use.

The conviction that all men have something in common preceded rather than followed the advent of Christianity as a force in civilization; and Paul's tolerance showed that great legal mind in constructive recognition of the spiritual unity of mankind embodied in the Christian faith as proclaimed by him. Christianity slowly changed man's relations and finally gave to medieval Europe the concept of equality of all tribes that originally had made Rome great.

It is this idea that explains the seeming paradox of the religious aspiration for a movement towards medieval unity under a political structure dominated by social and occupational groups with little relation to their central government; and where the individual counted for nothing and the group acted for all and determined individual social status. The church fathers preached in all countries one doctrine of Christian unity; and the church was the custodian of Roman order and became the state. The state ceased to be dominant as a political entity and became, in truth, the church.

The state and church were one, authority ruled all law and dominated every life. The Christian had succeeded the Stoic and Paul had converted the teachings and transformed the life of Jesus into a religion which now enveloped Western cultures and dominated its learning and life; but Caesar still ruled the individual and the authority of Aristotle dominated the concepts of science, politics, law and religion.

Those of confidence in the certainty, or of great faith in the efficacy, of a global parliamentary government *forthwith to end war*, without an instant sustaining world opinion or in disregard of the political or societal experience of its constituent peoples and their mind development, should

ponder the dark ages as the disappointing sequel to the successive efforts of the universal Christian and Mohammedan churches to unite all peoples in the worship of one God under one government ordained by authority of his Roman or Arab vicegerent on earth. During these zealous and violent, but none-the-less premature, strivings for ancient world unity, human thought for a thousand years was in almost complete eclipse.

There are few who now attribute the failure of the Church to christianize and unify mankind to any infirmity in either the teachings of Jesus or defect in the Christian church-state structure or lack of zeal or statesmanship of its hierarchy. The impartial student must conclude that the power employed, discipline exercised and authority asserted by the church-state for centuries saved Western cultures from the tribes that continuously menaced and finally overwhelmed it, but did not extinguish either the fires of religion or the lamp of learning.

The church-state failed to establish world unity of religion and government because vast hordes of barbarians were yet in the outlaw and pagan stage and alike indifferent to the appeals of Christianity or to the sanctions of law. And those individuals who accepted the former or were responsive to the latter continued to be dominated by Aristotle until Copernicus initiated his revolution.

Nation as Supreme Sovereign of Justice:

SINCE THE PENDULUM of state action had passed from the liberty of the individual to the order of the state and from the state stability to the unity of church and state as the extreme expression of group dominion, it is but natural that in its backward swing the first protestations of individual against group power should express itself in the liberty of the group as an organized state. It was the Renaissance that gave the conception of a group of men developing as a distinctive nation. Geographical discoveries increased and changed trade routes, which created and enriched a great middle class and increased the wealth and power of kings. The invention of gun powder destroyed feudalism; and the printing press diffusing Greecian culture and Roman law throughout Europe, gave a humanistic spirit

and new outlook on life and, finally, created a public opinion which deserted the cause of the church for that of the kings.

This expansion of the human mind gave to independent intellects their conception of the sovereignty of the state as a distinct entity and of the people as the sovereign power back of the state. It is this concept of sovereignty which the Renaissance gave to the science of government; and it is this nationalism which finds expression in the pride of patriotism and has caused men to look to strong states with good laws for the protection of property and the security of individual liberty under the rule of law.

The growth of great nations shattered old landmarks, founded new colonies, established a new society and new religions protestant in reformation, created a powerful middle class and evolved a secular state which asserted by force of arms the power of the nation. The Renaissance gave to the growing middle class the knowledge of sovereign power which Marcellius discerned in the people, and also, of a fundamental concept of Aquinas—that government exists for the good of the governed.

People as Sovereign of Nation and Arbiter of Justice:

THE WORKING of the creative mind in the development of states as nations and organization of nations and the administration of justice through government under law is well illustrated by the manner in which the idea of sovereignty of the people has changed political institutions and social relations. Hardly a ripple resulted when this probably most momentous concept of human association was cast on the stream of human thought; and this because it was wholly or partially submerged in the authority of the times and in the supine subjection of the people whose power is asserted.

Finally, however, it came to the attention of the receptive minds of Bodin, who emphasized the dominance of the state over the church, and of Hooker, who applied the democratic concept of ecclesiastical policy and gave to religious organizations the principle of self-rule. Harrington, Locke and Kant made civil government by free men the foundation of political institutions, which Rousseau and Voltaire in France and Paine and Priestly in America and England converted into the revolutionary ideas of

the sovereignty of the people, the equality of man, individual freedom, private property and the general welfare.

When these rights of man became the aspirations of human justice under the higher law of nature and were diffused generally among the masses, they ushered in the age of reason and destroyed feudal foundations, undermined the bases of monarchy and autocracy, sapped the vitality of a reactionary church and, finally, became the fundamentals of a new nation with a revolutionary form of government wherein the pendulum now swings from authority of the state to the power and freedom of the individual as ruler of the government of the nation that controls him and as the ultimate arbiter of the justice that governs him.

People's Fear and Mastery of Government:

THE GREAT underlying purposes of man often come to pass from causes, in ways and amidst conditions no human mind had previously conceived. Anarchy and chaos followed the surrender of Cornwallis and the sequel of the Paris Treaty of Peace in 1783, in the words of Madison, was that "no money comes into the Federal treasury, no respect is paid to the Federal authority and people * * * agree * * * the existing confederacy is tottering to its foundations."

This condition of internal dissension, open rebellion, repudiation of debts by states and their payment by individuals in dishonored depreciated paper and this period of excess of democracy with its turbulences and follies, when now without one exception the majority had usurped all the rights of the minority, continued for a period of five years from the day of national independence and for twelve years after Lexington.

The nation then was saved only because discerning minds detected the causes of demoralization and disunion lay in jealousies and hostilities of self-seeking states and the tyranny of an unchecked majority. And it was preserved for posterity only by the splendid courage of patriots who warned of the dangers of confusing license with liberty, who appealed to the people not to become the dupes of pretended patriots and who, finally, made the states realize that the foundation of all legal order and group

and individual security lies in Harrington's equilibrium of all political, economic and societal forces within the nation and functioning through its government.

The Articles of Confederation were revised at Philadelphia in 1787. A new fundamental law for formal ratification by the people of the new American nation was then promulgated because the stronger states relinquished their dominance, the weaker states forgot their fear, all states delegated every power essential to the supremacy of the central government, the federal and state governments were subjected to limitations on the use of power and the people imposed restraints on their own sovereignty as exercised by majority rule. It was this last great concession of individual minds, who through discipline had mastered self and now controlled economy and politics, that realized the necessity of checks and balances in the government of the state.

Compromise and concession then reconciled the conflicting interests of states and of individuals. A century and a half of freedom from violent revolutionary change and of purposive adaptation of our constitutional law to the changed economic and social conditions of an expanding and progressive people demonstrates the philosophical foresight and practical wisdom of members of the Constitutional Convention in the fulfillment of the most vital purposes that have ever moved the human mind to higher levels—the formulation of a fundamental law for the governance of man under self-imposed restraints, to the end of security and of just balances and right relations between the group and the individual, among all individuals and adaptable to all conditions evolved by the human mind.

VIII

JUSTICE AND ECONOMIC
ANTITHESES IN HUMAN
INTERESTS



Chapter One

RELATION OF JUSTICE TO ECONOMY

Relation of Political and Economic Changes to Justice:

THE MECHANISM of government has passed through many forms to meet all conditions and to control all sorts of men. Government under a constitution assumes the full capacity of the people to govern themselves. But a constitution, written or unwritten and whatever its concern for the individual or the nature of its assumptions of his capacity for self-government, cannot assure to him either political freedom or economic justice.

The people disclose their capability to govern themselves in the type of their representatives. Free men rule and are the masters of their government only when constitutional limitations of political action under their control, are defined by their representatives in terms of civil liberty and economic justice and change coincidently with economic power; which varies with the ownership and control of the material resources, and mind development of a nation.

We have had almost a century and a half of government by rule of the people; but Harrington's principle of economic interest in government, while not entirely ignored, too much has been neglected. The result is that representative democracy in England and the United States has assured political equality and justice under law. But we have missed something of democracy in economy; and with it, have postponed the opportunity to establish a state with its true balance of justice, which recognizes diversity in the capabilities of men in the economy of production and yet requires such distribution of profits "that no one man nor number * * * can come to overpower the whole people by their possessions."

The beginning of the political reformation of England in the seventeenth century was made possible because of a weakened Crown. It was completed during an industrial revolution which took the workers from the fields into the factories, carried English goods wherever ships sail and without violence changed fundamentally the nature of the nation's capital and wealth from its only forms, of land and its products and rentals, into personal property consisting of money, either coined metal or paper evidences of exchange value, and movable goods of commercial value.

Barnave was of practical and trained intellect and one of the most profound and original thinkers of the leaders of the French Revolution. His was the first mind to suggest a fundamental fact, if not the most efficient cause, in the evolution of the structure of society and political organization of states. It is his theory that "from the moment new forms of wealth are created, a revolution in political laws is prepared. A new distribution of wealth produces a new distribution of power."

This theory is illustrated and confirmed in the change of form of government coincident with the change of the nature of property in England and the nations of Central Europe with, however, two essential differences. England preceded France by almost a century, and Germany a century and a half, in the transition from absolute monarchy to parliamentary government and from feudalism to individual ownership of land and things.

But there is another lesson of deep significance that may be deduced from the inclination of the Anglo-Saxon mind to adapt its political and economic structures to the changing forms of property and to the expansive energies of the human mind. England has never experienced a permanent political or economic change as the result of mass violence; for a restoration followed and in no small measure uprooted the reforms of Cromwell, the only bloody upheaval of the English people.

The reforms by peaceful adaptation of political agencies of government to changed economic conditions, e.g. the first parliamentary changes of 1688, the economic reforms of 1832 and the enlargement of the state's

regulatory and affirmative functions in economy of the present century—all have endured and furnish an instructive lesson and an irrefutable answer to those of Marxist conviction, who contend there can be no abiding reform without revolution, or change of property use without confiscation, or abolition of wrongs or adjustment of rights or compromise of conflicting interests without first chaos, then violent class strife and ultimate group domination.

Chapter Two

RELATION OF SELF-INTEREST AS FOUNDATION OF ECONOMY TO JUSTICE

Self-Interest and Capitalism, Wealth and Profit as Conditions of Property:

THE BASIC ECONOMIC PURPOSES of civilization are (1) property and its ownership, which defines the exclusive use of things; (2) government by means of which life is disciplined, the use of property is regulated and liberty is both limited and protected; and (3) religion that ties man to his kin and to the Creator of his aspiration for self-realization under justice.

The utilization of private property in the making of new and more of better things is capitalism; and the motive that stimulates the individual mind to desire to produce and to increase consumption is personal satisfaction. This self-regarding interest may be either the instant advantage of some material value or the temporary pride of achievement or the enduring esteem that follows a rendered service; but whatever its nature, it is a *profit* to or of individual initiative and enterprise that in seeking the satisfaction of his desires has increased the world's wealth.

Wealth then consists of something more than the aggregate of all material goods, which Marx in acceptance of Smith's concept made a foundation of his theory. But Muller, decades before Marx, in a criticism of Adam Smith, opposed the concept of their use value to the latter's assumption of the exchange value of concrete things; and so, the wealth of a nation includes all mind energies of purposive utilization, achievement and culture.

Universal assent is now given to Muller's comprehensive postulate—

"the national existence in its widest possible scope is the true wealth of a nation." This nationalism partakes of universalism, since it includes not only the things that can be handled, measured and weighed, but as well the contributions of all professions, the skill of all specialists, the acts of all experts, the ideas of all thinkers, the words of the statesman, the prayers of the priest, the dreams of the poet and the images on canvas or in marble of the artist which "ennoble the heart or enlarge the imaginative faculty" of all peoples—even though neither words, ideas, pictures, statues nor acts reach the markets for the exchange of material values.

This distinction between material and mind capital and wealth is not nebulous; nor is the differentiation between use and exchange value academic. Their pragmatic utility is confirmed by the instant confiscatory use of taxation as a method of wealth distribution and by those shifts in the decisions of the Supreme Court of the United States referred to in these pages; and which in purpose to make more definitive the social nature of wealth and of profit, have sustained as constitutional basic changes in the substantive law of property and in the administrative functions of government.

Most significant, the individual property theory of value has been redefined in terms of public welfare in the effort of that Court to make use or exchange, in relation to society, the ultimate test of value; thus reserving the definition of "its meaning to the state" to be the final standard of value as "ascertained when a thing is in its place * * * in the economic and political body of the community"—as when it is in Harrington's equilibrium.

A nation or an individual may have an abundance of material things under dominant economic competitions and conflicts, and the former may become invincible in aggressive warfare of either economy or arms; and yet, both may be in dire want of the things that make for the development of individual character in helpful inter-dependent association. For it is this need which really gives power to a nation inspired and ruled by a collective will for a basic justice that realizes the aspirations of all to share in the

nation's wealth by giving to its every constituent, who renders service to the state, the equivalent of the profit of his muscle and mind contribution to its wealth.

Justice and Wage Conflicts in Plenty and Self-Interest:

IN THIS LAND of plenty and mounting surpluses there are, at some times and places, idle hands, minds without enterprise or confidence, hearts so devoid of hope as to see only the vista of despair as the present presses with unsatisfied needs, increasing wants, disquieting fears and the imminence of war.

This paradox of dependence in plenty, of idleness in surplus and of despair amidst the urge of desire to do and the will to achieve is new in the experience of man and without its counterpart at any period of world history. The ills of the human race in the past always have been the harvests of pestilence and war, the hunger for food, the fear of famine and the certainty of insufficient supplies unjustly distributed. Mere subsistence no longer should be the iron law of wages, nor ought they be fixed alone by management.

It is a fair criticism of the present relations between the employer and the worker that they involve only their respective contributions of service in the joint making of consumable goods and wages paid to the worker; *but ignore the respective interests in the joint venture of the consuming public and of all three parties to production—labor, management and ownership.*

Since under the present industrial system profit is regarded as wholly the return to capital investment and reward to managerial service, and the costs of production are exclusively controlled by management, the compensation of all other workers is expressed in wages as determined by management. Hence, the misunderstandings between capital and labor for the most part are reducible to conflicts of interests as to the compensation of the workers of which a *basic wage, hours, and conditions of labor* are the points of controversy.

This conflict between capital and labor can never end so long as each

mistrusts the other and the only bond between them is this rigid factor of a money wage, controlled by management; which in over-reaching self-interest exacts the most of work energy for the least wages, the worker forces the highest pay for the least work and both ignore public interests and the contribution of flexible profit sharing to the welfare of all.

Basic Fair Wage and Flexible Profit Sharing as Complements of Just Compensation:

ALTHOUGH COLLECTIVE BARGAINING and other expedients of intelligent choice and self-interest may stop temporarily strikes and acts of violence and give intermittent peace, it is inevitable that the conflicts must continue until all parties to production treat one another with mutual trust.

Or, this faith in the other failing, until the consuming public, in protection of its own interests forces the antagonists to the full realization: That a basic, periodic and fair wage must be supplemented by a mutual confidence and faith in an equitable distribution of the profits as the measure of just compensation to the worker. Thus only, the balance of Harrington's equilibrium will be established in the economy of production; and permanently can be maintained by a fair basic wage and its flexible complement of profits shared as the essentials of just compensation.

The reasons which demand this flexibility in the essentials of just compensation to all workers may be summarized in a few sentences of contrasted assumptions. It is not true the cost of living alone regulates wages, but the fact is that the cost of living as a factor increases disproportionately to the higher money wages paid; and there is always a great disparity of income between the favored and victim producing groups. The present incomes of the farmers and the wages of organized union workers are the highest in the history of labor, but the compensations paid to the white collar workers and the fixed incomes of the prudential savers of the nation's wealth have now relatively the smallest, and a constantly decreasing, purchasing power.

Nor is it true that either exclusively high or low wages alone cause unemployment. The factor that is present at the beginning and during the

whole period of recessive production and increasing idleness is the break of balance between the costs of production, as reflected in commodity prices, and the purchasing power of the consuming public, as expressed in the respective compensations distributed to the owners and the workers.

Too high wages and too short hours make unemployment inevitable because the public cannot absorb the excessive production costs—can buy neither food, nor clothing, nor shelter at prohibitive gray or black market prices. So also, too low wages and fatiguing hours destroy purchasing power; and the sequel of both these aspects of a sole rigid money wage is that the employer is confronted with losses, and in fear of inevitable insolvency, he cuts production by decreasing work hours and discharging workers.

Thus, begins the emasculating circle of an uneconomic wage, which in its increase of unemployment and decrease of purchasing power, makes more obvious the vital mutual interest of both labor and capital in profits; and demonstrates the necessity of supplementing a fair basic money wage with a flexible equitable distribution of the profits—to the owner as dividends and to the worker, alike of managerial or mechanical mind and of muscle, additional bonus or deferred pension compensation grounded on the values contributed by each to the joint venture.

Rigidity of Wage and Denial of Profit Sharing Causal of Conflicts:

THERE ARE TWO FALLACIES that affect, and so long as they persist, will make impossible the realization of a flexible wage and the just distribution of profits, as the consummation of a statesmanship in governance and in economy that seeks to maintain the equilibrium of costs, prices and wages. Without this concept and the attainment of its purpose, there can be neither continuity of employment nor fair wages nor profits nor justice in human relations.

First, no greater disservice can be done a just economy of individual enterprise than for organized labor, in its demand for rigidity of a money wage scale that moves only to higher levels, to invoke the complement of profit sharing solely for this purpose; and either to demand its continu-

ance or to ignore it as an element in reducing a flexible money wage when industry declines and profits vanish.

Second, the employer who refuses to grant to the workers a voluntary profit sharing plan as the essential of a flexible wage requites his government's justice to him with injustice to the worker; *since the just distribution of profits is now induced by Federal incentive taxation, which permits such specific disbursements as deductible production costs in the computation of taxable net income.*

Labor unions are indifferent alike to serving the purposes of their existence and the interests of both workers and employers—whose production is in fast decline from maximal war effort—and are unfair also to the consuming public—so confronted with decreased purchasing power—if with strikes of violence, they exact rates of money wage justified solely in the fallacious formula that money wages must proportionately increase with profits and be instantly distributed as additional cash compensation.

The relationship between wages and a prosperous industry as reflected in profits is obvious. There is, however, a vast difference between making a temporary and fluctuating net profit the warrant for its instant payment to the workers in the form of an increased money wage and the present distribution to the worker of a part only of his share of such profits and another portion distributable to him as deferred compensation in the form of a thrift bonus, annuity or pension premium—with their consequent deduction as production costs in the assessment of the employer's tax liability.

The preemptory demand of labor for the immediate cash distribution of profits as wages is alike injurious to the welfare of the worker and hazardous to the solvency of the employer and against the public interest. And this, not only because the distinction between wages and profits is ignored, but for the foundation economic fact that a basic money wage tends to become frozen at the highest levels as the minimum standard of the industry. Moreover, the fundamental law of self-interest will impel the worker to hold to the higher money wage as the cost of living and profits

increase and to refuse to lower such basic wage as living costs decrease, profits turn to losses and unemployment impends.

It is clear to pragmatic minds that seek the right answers through human means, we are here giving thought to the solution of the most momentous problem that confronts our civilization and now menaces the free workers of Western economy and presently confounds the demands of its humanity. For the issue involved transcends contests that periodically imperil production and employment, and the clinging to an unfair wage rate with the attendant conflicts of violence.

In larger aspect, it comprehends the mutuality of aid and of trust as nations define the nature and effect of profit sharing under incentive taxation and prescribe the duties of organized labor and obligations of individual enterprise in relation to it, as the essential complement of labor's compensation under our economic policy and as a facet of universal justice.

Intelligent Self-Interest as Foundation of Economy:

FEAR has been man's most constant enemy; but also, is his greatest incentive to achievement, when supplemented by intelligent self-interest. Great as was the need of mankind for the control of fear in scarcity, it presages an insidious menace when unemployment becomes general in an economy of plenty. This is because fear of the loss of job or of property or of want amidst plenty or of dependence in old age, when indulged by the individual, all and singly breed the worry that enervates and the subjection that enslaves. When such fears are shared by many the judgment of the masses is unbalanced, reason is unhinged and a reckless hopelessness exposes the workers to the emotional appeals of false theories of economy. In passionate protest and unleashed selfishness, the workers then become the dupes of designing demagogues and the victims of class hatreds and aggrandizements that must embroil all, in their variant levels of development, in violent group struggles, as well as embittered individual competitive conflicts that may for a time suspend some aspects of government under just laws.

The primary concern of the state should be that these fears be neither eliminated entirely from human struggle nor weigh too heavily upon the

minds of men. And this not alone for the reason all men of whatever station and service in life are similarly motivated and have similar hopes for reasonable security against unemployment and for comfort at the end of their work days, but the more because of inherent justice and of imminent peril to social order.

It is too seldom realized that in the ultimate it is mind which rules muscle, and both mind and muscle give value to the individual as the paramount economic unit. The source of the wealth of the nation is this mind constituent; which in America is the experience and tradition of individual initiative, enterprise and striving, of personal human rights and duties and not of class conflicts or group struggles.

The American individual worker has not yet submerged either his personality or identity in machine regimentation even though the assembly platform tends to make him a cog in mass production and although the power of capital and the pressure of his union sometimes would deal with him as a commodity—as an automaton and not as a human being.

Moreover, it always has been and must continue to be assumed—so inextricably are bound together capitalism, profits and the American worker's concept of individualism—that the first two of these co-efficients of economy will not long survive the submergence in class struggles of the worker's ideal of his personal worth and independence.

Controls and Profit Sharing as Economic Justice:

SECURITY is neither a freedom nor a right. Whether implored in need or asserted as a right, the recipient of security seeks the favor or protection of the dominant power of the state; and so puts in pledge, if he does not forfeit, his freedom. Dependence on the state for economic security is a fallacy that contributed most to the dominance of Nazism and now sustains the statism of Russia. But free men in a representative democracy, in exercise of their right to rule, so should limit individual action as to give both security and freedom to every citizen.

The control of prices or wages, rationing of food or the allocation of materials in production or trade or the promotion of public work are the

expedients of government to promote the general welfare in the stresses of economic strain or to provide for the necessities of war.

A flexible wage and profit sharing plan distribute constantly the products of industry in such just and prudential manner as to tend to minimize the maladjustments, mollify the conflicts and restore speedily, if not make impossible or prevent, many dislocations of economy.

Controls and permanent public improvements are the tools of governmental power evoked in emergency to supply human needs and to prevent injustice being suffered by the many to the advantage of some in authority or favor.

Profit sharing as the complement of a fair basic wage gives *continuity* to a just economy and assures both economic security in times of emergency and political freedom always to the individual.

All governments in war become police states and assert autocratic power, but the rulers of free government dare never forget their duty in peace to the people, who clothed them with absolute powers in war. Effective as were the controls applied during the last war to food prices and wages, they should be continued in peace only if imperatively demanded by economic maladjustments, *impossible of immediate correction by methods free of regimentation evils*. The answer to this momentous question, should not confuse conditions with ideologies, since our inquiry is restricted to the existence of a paralous economic emergency capable of correction only by totalitarian controls. For inflation is here; and the manner of its control will test our democracy in government and in economy, as never before challenged.

Money is a symbol of exchange value. It supplies more or less counters which in volume should be adequate to function as the medium of exchange. But money is without significance as a factor in determining the nature or volume of production or of consumption or of the purchasing power of instant labor or the exchange value of past labor.

In normal or inflationary economy, the real test of the worker's condition and welfare is what his labor will buy—not the number of tokens he

receives as money, but how much work he must do to get what he wants. A Russian under the absolute controls of Marxism may have to work for a pound of bread seventy minutes, measured in the exchange value of rubles, to the seven minutes of the American under private enterprise computed in dollars; and this contrast of work or hours for food may convince our workers of the wisdom of private enterprise.

But when our intelligent worker recalls the parity of the dollar of production with the purchasing power of the dollar when war violences ended and he realizes the present average increase from then in foods is about sixty percent and more than forty-two percent in other than food needs, he becomes less satisfied with the increased purchasing power of his labor as contrasted with the worse conditions of the Russian worker and the more rightly concerned with the inflation of values that now imperil American economy and his future well-being.

Profit Sharing as Economic Justice and Inflation:

THIS CONCERN partakes of anxiety as he contemplates in every of the war nations similar scarcity of food and goods and increase of commodity prices; and more forboding, that the disparity of purchasing power increases as credit becomes more expanded and the higher prices more prohibitive of normal consumption. He knows also the remedies to control this peril are often expedients and that inflation is an economic malady that follows war; and so he fears the arbitrary destruction of the purchasing power of money, as in Russia, or the confiscatory taxation and forced loans for public improvements, as in France, or the more efficient war controls and doles that continue of England. In his search for a rational solution, he concludes that since the effects in all countries are similar, there must be like causes for the differences between the conditions before and during the war and those that followed the peace. In this change of basic conditions then may be found the causes of the instant world wide inflation and possible suggestions of its remedial control.

When war began, industry ceased to produce for direct individual consumption and became an arsenal for the making of things for both the

preservation of life and the destruction of property and life. Productions thus increased immediately the number of workers and things made, in day and night effort, to supply the needs of only one consumer—the nation whose war demands were imperative and beyond the capacity of industry, and whose cash plus purchase prices gave to contractor and worker the highest of money payments. When the peace came, production for the civil uses of individuals fell only to a decimal of that required for war necessities, the vast volume of which material, moreover, was destroyed in military objectives; and what is of now vital concern, there was the destruction of the goods of civil life, that now are required for food and shelter of the returned veterans—both victors and vanquished and their dependants. Private enterprise consequently is now without surplus supplies for civil consumption, because it is without basic materials and equipment adequately to produce goods for immediate needs; and so prices have mounted as scarcity has increased and demands are unsatisfied.

The problem then that confronts world economy will remain unsolved until the factors following are equated: Production in peace for public consumption must supply the deficit of war materials made for the nation and shot away or consumed in its defense; and inflationary commodity prices following scarcity of basic materials and inadequate equipment for fabricating peace needs must be met by continuity of employment and commensurate purchasing power.

This process of equalization does not mean that peace production must equal the abnormal war effort in volume or number of workers or high wages paid; but it is essential that such level must be maintained in peace as will supply civil needs and so assure continuous employment at such adequate wage as to make certain, at least, the worker's economic security during this perilous transition period from war to peace economy.

The delicacy of this situation cannot be exaggerated. In the ending of war production, great numbers of veterans seek permanent place in a decreasing volume of production, competition for jobs and unemployment must increase as commodity prices rise, savings must be consumed to meet

living necessities and there is now an alarming extension of individual credit as the increasing disparity between living costs and income makes borrowing the necessity of imprudent installment buying.

The peril of inflation is bound to become acute with crisis imminent and a collapse of industry inevitable, if the employer or worker groups ignore the duties of self-restraint and the demands of reciprocal justice; and if the government refuses or neglects to use its power to prevent the overreaching of either or both groups in equating the interests of each and so conserving the common weal.

Experience gives clear admonition of distinctive fears. Let the worker make his successive demands for instant distribution of an increased cash wage or let the employer refuse to give to the worker a just share of the profits in addition to his wage as deferred compensation, *as the profits and volume of peace approach war production*, and inevitably will follow a surplus of production in excess of consumption because of prohibitive inflationary prices and the collapse of industry as production stops with a diminishing demand.

For the general public will then be without adequate purchasing power, the savings of the worker will be exhausted and, with increasing unemployment, they will be alike unable to buy on new credit things now in excess production or to repay the moneys borrowed under a too liberal past extension of credit or to buy the necessities of life at the mounting prices of inflation's vicious circle.

Inflation as a natural sequence of war can be controlled and its evil effects avoided or mollified, without arbitrarily reducing the purchasing power of money or exacting confiscatory taxation for public works only: (a) *By restoring the war controls of credit, commodities and wages or (b) by voluntarily supplementing the worker's cash wage by sharing the profits of an increasing production distributed solely, however, as deferred compensation in the form of bonus, pension, annuity, unemployment or other economic security indemnity.*

If our national economy will not adopt the justice of a flexible de-

ferred distribution of profits with consequent immediate utilization of the worker's cash wages for equating purchasing power with an increasing production, then government controls with attendant regimentation, rationing and doles of a totalitarian state must be evoked to prevent the economic collapse of the nation as it seeks to recover from the malady that always follows war.

Or if in larger aspect, in the determination of the worker's wage, management or labor should refuse to recognize the factor of flexible deferred distribution of profits either in initial amicable collective bargaining or as an essential in the settlement of issues that futilely have sought solution in strike violences—then the established tribunals of justice must use their power, or be given the jurisdiction, to equate the interest of each to the conservation of order and the public welfare.

Chapter Three

RELATION OF EQUALITY OF OPPORTUNITY IN ECONOMY TO JUSTICE---

Ownership of Land as Opportunity:

THE PASSION for equality of opportunity before the law is the strongest emotion of the individual in expression of his eternal aspiration for justice. This aspect of justice involves human economy in its inclusive concepts of the right to life, the demand for security, the respect for property and the enjoyment of the compensations of individual enterprise and work. Economic equality means free access to the means of production, free opportunity to become a part of the world's productive work and to share in the just distribution of consumable things and profits of industry.

There are four epochal policies that have laid the foundations for equality of opportunity in the development of American economy—(1) The extension of the territorial limits of the United States; (2) free distribution of homestead lands; (3) regulation of monopoly and of commerce in the development of Federal control of trade and labor conditions; and (4) sharing of profits, under incentive taxation, as deferred compensation for the security of workers.

Every of these policies has promoted equality of opportunity by removal of barriers that might or could impair or impede a free economy; and all of them have contributed to the equality of economic effort as they affected property in the predominant form or use when they were successively adopted. These policies will be discussed in the order stated, with more extended consideration given to the aspects of *monopoly* and another chapter devoted to the effect of *incentive taxation* on the justice of profit sharing.

Extension of National Boundaries and Ownership of Land as Essentials of Opportunity:

LAND was the one form of wealth when colonists began to settle America and until the industrial revolution brought about the present system of capitalism. The American settlers could not escape from the inequalities of condition—mind, moral and material—to which centuries of political oppressions and economic wrongs had contributed; but to them, the contrasts made no difference. United in a common purpose, they did more than found their nation on their declaration that "all men are created equal."

They adopted the policy of Jefferson: That the territory of the United States should be continental, bounded by the waters of oceans, lakes and the gulf; and this to an end that to every citizen shall be given the opportunity to become the owner of land and so assure the individual security and freedom that are the rewards of free labor. Some would make Jefferson the dreamer of a "vision splendid," when he pictured America as a nation of freeholders. But this narrows his conception literally to the then existent form of property, and ignores its fundamental nature that would make ownership of property in any form the essential of both freedom and equality—the buttress of the former and the stabilizer of the latter.

When Jefferson made his purchase of the vast territory west of the Mississippi, less than seven per centum of the American people resided in the seaboard cities. Practically all Americans lived in the country on land, individually tilled by the owner or tenant, or in the smaller settlements scattered over the interior as frontier forts for defense or trade. For almost a century, both the European immigrant and American pioneer moved from the cities to the new frontier lands and towns of the West, South and Southwest to settle as individuals and establish homes under the equalizing policy of Jefferson.

Lincoln, during the stress of Civil War, in clear discernment of the real purpose of Jefferson and in furtherance of what he conceived to be the

duty of the Federal government to provide for the increasing needs of free labor upon the ending of hostilities, signed in 1862 the Homestead Law that granted an absolute title to one hundred and sixty acres of land to worthy home seeking Americans. This allotment of free homesteads to free men has become the settled policy of American justice to the pioneer builders of American homes and developers of the resources of the continent. Whenever there are public lands available for settlement, wherever situate, it has always been thrown open to the individual for him to acquire his stake in the nation's wealth; and such now is the privilege of veterans of wars to extend American frontiers in Alaska.

It is this policy of Jefferson, now become a vital principle of American polity, of keeping open the way of equality of opportunity for every worker to share in the development and ownership of the land and resources of his nation, that has made it the dominant force of world economy.

Chapter Four

REGULATION OF MONOPOLY, COMMERCE AND LABOR AS ESSENTIALS OF OPPORTUNITY

Cooperation, Competition and Choice as Factors of Capitalism:

NEITHER HUMAN SOCIETY nor its economy is determined alone by environment. The government of society purposively is organized and its economy scientifically can be directed by wise and just management of industry, in which all forms of property are made and used under private enterprise for human satisfactions. During the reactions of revolutionary political and social transition, St. Simon, Fourier and Owen inspired enthusiastic disciples with the hope of the scientific control of industry and attendant economic reconstruction of society by the practical application of self-help and mutual aid through intelligent cooperation. All three assume individual property as the basis of Western cultures and the necessity of its control for the general welfare, but they opposed violence as a means of economic or social change.

It is ironic that the institutions evolved by man for the inculcation and realization of the Christian fundamental should have been so indifferent to the true significance of the altruistic dreams and practical experiments of these men of mind and heart as to withhold sympathetic support. Inducing St. Simon to emphasize the social element of Christianity, and provoking Owen's hostility to the doctrine of original sin and pre-destination, the established churches caused such destructive conflicts between religion and pragmatic cooperation as to make inevitable the abandonment of the experiments.

These idealists in intellect and character were the flower of American

culture and their failure to found permanent cooperative groups is the fate of all, who in humanitarian action advance too far ahead of the many at the jungle level. But new life eternally fills the serried generations with good and determined men; elevating aspirations are of enduring worth and continuous horizontal expansion, experience learns through error and hope ever inspires the march of ideas to progress. So, the Christian socialism of Maurice, Kingsley and Pope Leo XIII finally supplants the apathy of religious teachers; and all religions are aroused to the need, and now give earnest and devout effort to inculcate the duty, of right choice in conduct, and thus make the work of the world both competitive and cooperative.

Cooperation, however, is only one of the three elements of our present system of capitalism, which has persisted in various forms since man first began to save for future use the surplus of his efforts. The other two factors of capitalistic production and distribution are competition and choice. The foundation of capitalism is (1) *choice*, since the mind initiates and directs all productive enterprises and determines both ethical and economic values; and (2) *competition* and (3) *cooperation* are only the means or methods of applying the energies of power to the achievements of practical economic purposes.

It is the human intellect that supplies the satisfactions of man's physical wants and, above and before all other contributory causes, makes the choices that ultimately determine the degree and kind of his conduct and achievement. It is then axiomatic, the more accurate the decisions, the more precise the adaptations of human contrivances; and the more human inventions and institutions are in harmony with the underlying laws of nature, the greater will be the productive wealth of man and the wider, more equitable and horizontal the distribution of the opportunities to use and consume the goods produced.

Cooperation as Complement of Competition:

THE ERROR of assuming the possibility of eliminating competition from human work and achievement is thus perceived. For every individual is a personality of potentially new desires as well as a possible genius capable

of creating new machines or methods for satisfying existing wants. And his contributions to the economy, service and wealth of mankind, competing with the products about to be supplanted, must change the basic relations of many men to both the old and the new goods.

Now here would seem to be disclosed a fundamental fact of economy complementary to the biologic nature of man. His relations with his kind always have been, and must continue eternally to be, on a primarily competitive basis because as an animal he struggles to live and propagate; and as one of many minds striving for satisfactions, his desires, enterprises, choosings, purposes and potentialities are uniquely his own.

Competition then is a fact of life; and as a part of all vital relations, is as natural and fixed or as changing as is the assumption of any law that is supposed to govern the universe. Hence, the wisdom of realizing the necessary limits of the ideal of cooperation and of accepting its function only as complementary to, and in mollification of, the asperities of unrestrained competitive struggles.

So the state, in acceptance of the philosophy of individualism and unrestrained competition, has enacted laws regulatory of trade and condemnatory of combinations as unlawful restraints of free competition, e.g., of employers in production or distribution; or, in adoption of the philosophy of collectivism and in control of harmful competition, the state exempts from the operation of such statutes other associations, e.g., organizations of labor and of the producers of agricultural commodities.

Profit is the purpose of both cooperation and competition, but the only end of the latter. The cooperative movement, however, comprehends as well a social purposive end to both the individual group engaged in co-operative production and to the public that consumes. Cooperation is another form of competitive units, and it is of neither economic value nor social significance, if it fails to develop in its membership the essential disciplines of achievement—pride in excellence of product and a zeal to serve and improve the whole social structure by giving to the public superior goods at a fair price and honest service at just recompense. Coop-

eration then gives social service and trains its members to perform the functional duties of good citizens, whose concern is that general welfare which is made possible alone through individual culture.

Regulation of Combinations, Competitions and Monopolies:

IGNORANCE or the misuse of natural laws cause all wrongful results not only in the mechanics of industry but in every relation of life. The consequent problem is not to seek the impossible abolition of the natural laws that govern relations, but rather to correct the misuse or to stop the abuse of such laws. The excesses of greed destroy free and fair competition and impose on governments the duty to bring anti-social tendencies into conformity with the universal rules of fair strivings, free efforts and honest rivalries.

Hence, the several states reserve the power to prohibit trusts or monopolies and unfair trade practices and discriminations even though benefit and not injury may have resulted from the combination. The Federal Congress under its delegated power to regulate commerce between the states, in the words of the Supreme Court, has defined as an unlawful "restraint of trade" every "contract or combination" the direct and immediate effect" of which "is to destroy competition * * * so that the parties to the contract or combination may obtain increased prices for themselves * * * even though contracts to buy such commodity at the enhanced prices are continually being made. Total suppression of the trade in the commodity is not necessary."

The decisions construing Federal enactments regulatory of commerce and against monopoly to preserve freedom in trade and to maintain free competition in economy will be discussed under a subsequent Part Ten in the consideration of the limitations of power under due process of law. Reference, however, here should be made to some principles of just economy that too frequently have been overlooked in over-zeal to prevent, solely by statute, unfair competition and monopoly.

Competition is just, and monopoly cannot exist so long as reasonable rules prevail under fair conditions of economy, and the way is open for

new competitors to enter the industry. Laws cannot make men just; but men of good will can so cooperate as to make laws to restrain the outlaw competitor and to control the aggressor monopolist. And so just minds in reality do cooperate to hold in balance economic competitive relations through laws against monopoly by them enacted and enforced by a sustaining public opinion.

Although capitalism is man's natural instrumentality of production and the control of competitive abuses is the essential of economic freedom and social equilibrium; yet it is possible for economic error to flow from legislation so restrictive of competition, and which so misuses or abuses the primordial laws of human nature and economic relations, as to destroy the realization of its salutary objectives.

It is the opinion of some and the fear of others that many of the laws of over-paternalized modern governments have designed and planned futilely the means, methods and quantities of the production of the nation's food supplies in their effort to fix prices to the alternating advantage or hurt of the manufacturer or farmer or consumer.

The seasoned conviction of reflective minds is that without explicit grant of Federal power, our government has placed within the ambit of Federal supervision and power the economy and industry of the nation—in times of peace, without necessity of war preparedness and with a speed productive of maladjustments and unfair preferences and of discrimination to favored groups. The Tenth Amendment to the Federal Constitution is now without independent vigor, and our dual forms of federal and state spheres of government exist no longer because of explicit reservation, but alone by virtue of the original grant to the Federal government in the constitution.

The salutary policy regulatory of monopoly, as one of the foundations for equality of opportunity in the development of American economy, is then not without the hazard of abuse. This accelerated expansion of Federal power, within the last two decades, has impaired the liberty of all workers of every state, has confused the dual spheres of federal and state

supremacy and has reduced to the shadow of form the sovereignty of a state. It has taken from the individual his economic freedom and has imperiled also his guaranteed civil liberties by delegating to Federal administrative boards judicial functions of such nature and to such degree as to transform a government of law ordained under a written constitution into a government of men whose rule too often would seem to be dominated by the concept of class power and aggrandizement.

While the Court has said that "flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force" and that "the order of an administrative tribunal may be set aside for any error of law * * *," yet its last utterances are alarming in their implications of the conclusiveness of facts as found by such body and of differences in legal doctrine that attend reviews of appeals of judicial and administrative proceedings of such nature as to destroy fundamental legal maxims.

It is trite to add that governments must meet the changing conditions of life and labor and solve the problems of right relations by trial and error. This is the only method devised by human experience and assumes the creation or existence of agencies to make and apply the remedial experiment with reason and judgment. But neither the necessity nor the expedient means that final discretion as to either methods or results should or must be vested alone in the administrative body that is set up for purposes of experimentation.

It is the essential of a government of laws that the decisions of men in performance of a function of government involving discretion shall be made for openly stated reasons, which are reviewable by an appellate tribunal; for thus only can responsibility be imposed, error be corrected and the exercise of an arbitrary will be prevented.

Regulation of Cooperative Associations:

ALL IS NOT SELFISH animal satisfaction, nor are we all the puppets of chance environments. Through the ages man has struggled for more than an animal existence, else he never would have changed either his organism

or its functions or his condition; nor would he have invented tools for improving his body and mind functions to the end of doing better his work, increasing his comfort, enlarging the scope of his desires and making more certain the means of his satisfactions.

The human mind's purposive effort to make and to save for future use more than its needs for mere existence has solved the problem of man's development and his civilization, and explains the mystery of the expanding horizons of his physical and mental universes. This excess of production over consumption is called capital for new production or surplus for reserve use; and the mind energy that motivated and made possible the excess is the profit of production.

It is in the care and distribution of the profits of human industry, as made possible and as directed by the human mind, that give rise to all problems of human economy and social relations. Man has always assumed that the profits of production go to him whose mind made it possible to produce more than he and others can consume; and thus it is that profit, the contribution of mind, becomes a justification for the fundamental human institution of private property.

It is not alone the savings of production that contribute to profits; for any instrumentality or method that results in economy of labor, material or time in the transportation and distribution of goods or in the doing of any kind of world work becomes an economic surplus of value. In final analysis, the competitions of industry, trade, and commerce are reducible to strivings for these surplus profits; and hence, the consumers naturally seek to hold in check the profits of the producers by exercising the expedients and practices of intelligent self-interest. Thus, is perceived the wisdom of the great body of consumers forming cooperative associations for the supplying of their needs at prices that will tend to control the profits of the producers or at least minimize, through economies evolved by the consumers, the ultimate price to them.

The purpose, however, of consumer cooperation is not the entire elimination of the factor of profit, for most plans hope for periodic division

of profits in proportion to the amount of purchases and no human institution long can exist without reserve power in times of strain. The functional results of this exceptional social experiment are five-fold in their economic and social aspects: It minimizes the motive of profit, retains the surplus over costs for the conservation of the association and the advantage of its members, trains its members in the work and responsibilities of employer management, gives its members the sense of pride of achievement and pleasure of service and contributes to a fellowship of mutual aid and individual profit that is salutary and of most significant communal import.

Need, Scope and Extension of Cooperation:

IT IS NO PROPHECY of mere hope to foretell that the future of democracy lies in the ameliorative tendencies and enriching influences of the cooperative movement. Its essence is as simple as the lives it touches and improves. Its ambit is bounded only by the habitations of man, its operations are as various as human enterprises, and in the genesis of loyalties, it inspires in some a devotion akin to religious fervor, in others a zeal for constructive achievement without an acquisitive desire for great material wealth and in all of its members the sense of self-effort, self-reliance, the dignity of individual worth and a scorn for governmental dole.

The phenomenal growth of cooperation throughout the world in number of associations, increase of members, extension of functions and value and volume of business gives conclusive assurance that a rational remedy founded on laws of human conduct is now in practical operation of human affairs. This corrective of some of the injustices and alleviative of many of the wrongs of unrestrained competition inevitably must induce modifications of capitalism and ultimately may lead to such fundamental changes as will make the present form and function of economy less of animal competitive struggle and more of mind cooperative mutual aid.

In the deep satisfactions and infinite hopes that attend the realization of the startling success and stupendous possibilities of this momentous movement, our hearts grow tired as we contemplate the flood of federal and state legislation and decisional law that for a decade too often has

ignored the cooperative impulse as an economic and social force or has repudiated it, by explicit avowal of conflict and antagonism, e.g., in the first National Labor Relations statute, as the principle underlying the relations of labor and capital.

The cooperative impulse overcomes and corrects many social injustices; but as in the invidious class distinction purposively emphasized in labor relations during the last decades, obvious injustices have attended the law's favoritism to both labor and cooperative groups. These insidious discriminations against free labor and private enterprise tend to become vital to economy when they impose either unjust or confiscatory taxes on the private form of industry and trade, and exempt from all tax levies both the profits of cooperative associations and the patronage dividends distributed to both their member and non-member patrons.

There are no differences between the privately owned and cooperative corporations in their engaging in private enterprise for profit, in their methods of production and trade, in their compliance with governmental regulations and in their exemption from personal liability as either stockholder or member of the association.

They differ, however, in two essentials provocative of discriminatory injustice which the American policy of control of monopoly was designed to prevent. (1) The stockholder's only return on his investment is in the form of cash or stock dividends or prescriptive right to subscribe to new stock. A member of a cooperative venture has in addition to these rights the privilege of receiving a patronage dividend or refund on all purchases by him made from the association. But more unjust, because destructive of fair competition, is the right of the cooperative to pay to its non-member patrons a bonus refund on all purchases made by them. (2) A tax imposed on the income of private corporations as a producing unit and on all its stockholders as the recipients of dividend-income and the exemption of the cooperative unit of production, is a discrimination that imposes on the corporate form an unfair share of the tax burden of government.

The remedy for these injustices and discriminations against one form

of associated private enterprise, is not to make the cooperative structure less efficient by taking from it the things that have contributed to making it a legitimate and the most equitable form of economy in manufacture and sale. Since laws regulatory of economy are the same for all business enterprises irrespective of form, the demands of justice require, in equality of opportunity, that taxation laws should impose the same burden on all competitors, with neither special privileges nor discriminatory disadvantages to any one form of economic effort.

If it be accepted that the principle of incentive taxation has found just application in the exemptions granted cooperative associations and in their right to pay patronage dividends, it is here urged a similar exemption should be accorded to private business corporations. If, however, it is suggested present public opinion would not permit instant equalization by eliminating the income tax on private corporations, then the least remedial justice that can now be granted to the private corporate producer is to grant to it the similar privileges of paying a patronage dividend in cash or stock or credit to its stockholder or non-stockholder patron.

The time has come in the economy of nations for government to give equal heed to the demands of justice in the imposition of taxes as well as to the distribution of revenues for an assumed security, that too often emasculates the recipient, or as deferred compensation for past labor, that can be just only when not designed in redistribution of the wealth of the nation.

Regulation of Labor:

IT NO LONGER may be the natural tendency of capital to obtain the cheapest labor; but certainly, the more extensive and powerful the combination of capital, the more inevitable and certain the potential control of the wage, unless resisted by organizations of labor bound in combination by intelligent self-interest. Chief Justice Hughes has said:

“The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their

health and well-being but casts a direct burden for their support upon the community."

Hence, the law now assumes that all combinations of workers are lawful and no statute condemnatory of illegal combinations at this time may be construed to prevent the existence of any labor organization or to forbid its members from lawfully carrying out its legitimate objects. But until the Court spoke in the *Apex and Hutcheson* cases the labor organization, although not a monopoly, like any combination of capital was deemed to be guilty of acts which are in restraint of trade or which in contemplation of law constitute a monopoly.

"SOME LEGAL FOUNDATIONS OF SOCIETY" pointed out that, in extension of the *Apex* case, "the *Hutcheson* case * * * determined an indictment under the Sherman Law * * * does not lie against a labor union 'regardless of whether or not the defendants stand in the proximate relation of employer and employee'."

The hope was there expressed that these decisions may not for long stand as law of the nation whose foundation law is that equal laws and not men rule. Congressional action or overruling of decision or constitutional amendment must change a rule of law that inverts the pyramidal foundation of government, and makes the power and favor of a group dictatorship or autocracy the unstable base that sustains the broad and expanding freedoms of all men striving in private enterprise or individual achievement for social welfare.

The law as then declared opened a vista of struggle for self-aggrandizing political and economic power, which minds hate to contemplate who fear the favoritisms and proscriptions of government by partial men. These conclusions the Court deemed necessary because of the provisions of the then National Labor Relations Statute, now superseded by the Taft-Hartley Act, which may be corrective of the vice to which specific reference is made in the volume on CONCILIATION in the excerpt following:

"In affirmation of the fundamental tenet of Marxism, in disregard

of a foundation principle of economy, in denial of a basic concept of dynamic ethics and in ironic repudiation of the fundamentals of Christianity, the National Labor Relations Act is not predicated on the assumption that production and distribution is a joint venture of reciprocal confidence, cooperative effort and mutual profit; but rather, * * * on the recited finding, that the parties are in economic conflict, with antagonistic interests and a dominant employer power."

The false recital in the title and reactionary policy of this now superceded statute flow from the failure to realize that the realistic condition of recurrent strife and strikes is alone the result of the misunderstandings of both employer and worker, who confuse their immediate selfish separate interests with their larger and primary mutual interest in the joint venture, wherein in truth lies the intelligent choice and self-interest of each.

Misunderstandings of those whose interest is mutual, and not conflicts of antagonistic interests, or overreaching aggrandizements of either party are then the contributing causes of labor disputes, disturbances and injustice. Their removal by right adjustments, fair concessions and cooperative compromises to the end of the just distribution of profits as supplemental to a compensatory wage under instant incentive taxation, is the solution of a vital problem of societal and political economy.

The prior volumes and this book will have been written in vain, if there does not come to the reader the convictions that a government of order for the administration of justice has been laid; that deep in the conscience of mankind, in solid foundation law, now repose the instrumentalities for the individual's achievement of freedom, tolerance and justice in all relations of life; and that science has supplied the sanctions of universal justice against the outlaw individual or nation.

This volume should disclose the need of no new mechanism for the fulfillment of man's dominant purpose; which the reader should close with the conviction his mind and character alone will determine the kind of justice his government will give under laws now enacted that make possible instant and always higher levels of humanitarianism.

Chapter Five

PROFIT SHARING UNDER INCENTIVE TAXATION AS ESSENTIAL OF OPPORTUNITY

Human Capability to Solve Life Mal-adjustments:

THE LAST AND PRESENT CENTURY have seen more originality and utilization of invention, greater horizontal diffusion of comforts, larger expansion of individual efforts and clearer insight of human intelligence in the precise ascertainment of facts than in all history. These manifestations of mind are not confined to understanding the inter-actions of physical forces it has harnessed, mechanized and specialized with an efficiency and to ends which none could have conceived in any particular aspect or anticipated as a whole. The marvel lies in the manner and degree man has grasped the new conceptions of all the sciences and has adapted the idea of an energy ruled universe to the seemingly insoluble problems of human existence, with which the complexities of change confront, confound and almost overwhelm him.

There are those, however, who suggest the present mal-adjustments of life result from the inability of mind to grasp the great society as a whole; and in full understanding and just measure, to deal with human needs amidst so intricate realities. This assumption would make the modern mind of the same capacity as when it solved the problems of a primitive economy.

There is and always has been a lag between science and the political and legal mechanisms for the definition and administration of justice; and also, between these and the economic structure of society. But both observation and experience give denial to the conclusion that man has at any

time so far progressed as to be unable to solve the problems to which any level of scientific or economic development gave rise. No thinker who accepts the dogma of dynamic evolution refuses to admit the ability of the human mind to solve the immediate problems of existence as conditions of human life and effort change, else the certainty of chaos.

It is a denial of man's power to maintain his individuality in a social democracy and a defeatism in its most abject form, to suggest that the human intellect today reflects the mind of primitive man because the biologist, detecting no physiological differences between the two brain mechanisms, assumes identity of capability from sameness of structure or process. It were as well to contend the primeval and modern worlds are the same as to deny the survival of individual and social heritages.

For the facts of life are as our minds conceive them; and we observe not only the external object, but both conscious memory and the subconscious self see, feel and act the past ages of cumulative experiences. To affirm our inability to solve the present problems of politics and economy, because of identity of brain structure and similarity of mental processes with the primitive mind, is to forget the Homeric crudities of the childhood of our culture with its animalism and animism.

There is, however, a practical aspect to this betrayal of the human spirit. Not only are three fundamentals of human nature ignored—*know thyself, confidence in self-mastery and purpose to excel*—but let man supinely confess his weakness and concede his inability to provide for his present or future needs, and his civilization crumbles in surrender to a craven spirit.

No mind may question its power to meet and to solve every issue essential to individual happiness and group welfare, if it will but recall what man has done for self-governance and for the socialization of economy in the two centuries since he broke the fetters that bound him. For he has become the maker and master of machines which transformed authority into freedom and scarcity into plenty, has raised the life levels of all workers and, enlarging the horizon of mind, has widened the distribution of the

goods of life and has defined, in terms of freedom and justice, human relations heretofore dominated by greed and authority.

Economic, Social and Psychological Aspects of Profit Sharing:

WHEN PROFITS are distributed to the worker, not only is the just dollar received by him who is entitled to it, but its deeper significance is that the profits of industry are shared by the parties who jointly render to society the real service of production. So, it is through and because of the sharing of profits that political democracy becomes more secure as its base broadens to include both economy and government, capitalism is made less acquisitive and the relations between employer and worker are more co-operative to the advantage of both and the general welfare.

Since the personal relations that have always existed between the employer and worker are gone forever—because of the complexity and magnitude of industry and the great numbers engaged in doing many separate things with machine repetition, but without interest in the work or the profit—it is obvious there must be substituted for such vital losses the conscious pride in the new relationship of joint enterprise. But if this new aspiration for cooperation, of just compensation, of probable advancement and certain security through self-effort is to create and maintain the interested and loyal service of the worker, then the plan of profit sharing must be real and honest and not a specious and unworthy expedient to control or decrease the worker's just compensation.

There are certain conceptions of profit sharing which in reality distribute profits to the workers; but which lack or do not contribute the psychological essentials of incentive, interest, loyalty and sense of cooperative effort, that are the real contributions which make profit sharing the corrective of numerous economic wrongs and the solvent of many social ills. The granting to the worker an option to purchase stock or other proportionate interest in the enterprise at such price as to give him the advantage of a differential which is absorbed by the employer; and the expenditure of employer funds from surplus or earnings for the physical, educational and cultural welfare of the worker, in the construction of hospitals,

schools, libraries and recreational centers are methods of employer distribution of profits which, however generous, do not meet the tests distinctive of real profit sharing. Nevertheless, they disclose elements which should characterize just plans of profit distribution.

All profit sharing rests on the fundamentals that profit and necessity are the primal incentives of human conduct; that self-help induces self-reliance and confidence leads to increased strivings and larger achievement; that the less one does for himself the more he relies on the state and the more the state does for him the less efficient he becomes; and that given a just wage and a fair profit the great fear of loss of job and old age will be eliminated.

But too much should not be expected of the worker's thrift or prudence, and the just plan therefore should include the additional purposes of insurance against unemployment and old age by retention of such percentage of his wage and profit as will assure the worker both protections, either under enacted law or by employer's voluntary obligation.

Profit sharing is the highest level of employer and worker relation and rests on mind control of the lower levels for its success, because it requires a high degree of intelligence. This can be supplied only by democratic methods in the management of human relations, by close contacts, conferences and an educational program that will give to the worker full knowledge of the venture, and to both employer and worker such understandings as will sustain enthusiasm for and continue the success of the plan.

Since profit sharing is not philanthropy nor intended to be paternalistic in operation—but being founded on justice and the natural incentives of interest and loyalty presuppose the forbearance of present gain to larger advantage—the plan should afford opportunity to the worker to adjust his compensation in periods of strain so that by mutual sacrifice the joint effort may be stimulated and profits restored.

Finally, in the conflicting interests and changing conditions of society, no one remedy will solve all economic and social mal-adjustments; but there will be no relief of permanent nature unless by profit sharing the

worker, from free choice and intelligent interest, gives his loyalty and best effort to the venture and the employer, appreciative of the service, grants just compensation to the worker.

And so, every plan of profit sharing should be conceived, formulated and practiced in the larger pattern of an evolutionary change wherein a purely individualistic acquisitive system of competition is in process of transformation into a more cooperative venture of coordinated service for individual and societal, but predominantly just, purposes.

Percentage of Profits as Just and Standard Plan of Profit Sharing:

THERE WILL BE NO PEACE in industry and there can be no justice in life until the profits of economy are shared equitably among the parties whose work contributed to the success of the joint venture. The effort to accomplish this greatest achievement of human endeavor may partake of any of three forms, in every of which the plan of distribution bears a direct relationship to the earnings of the venture for a fixed period.

The determination of the worker's share in the profits varies with the factors on which it is computed. (1) A type of percentage distribution may pay to the worker a dividend on his wages, as and when a dividend is paid to the stockholder and in related ratios; (2) or the payment may consist of a fund composed of a certain percentage of the worker's wages, and a contribution of the net profits by the company; (3) or it may be based on the net profits after deduction of all manufacturing costs, including profits distributed to workers as wages paid and compensation for the use of capital.

The uses of the fund so gathered from the earnings and contributions also differ to serve distinctive purposes of the several plans. The funds may be retained by the company as a trust, but preferably, should be turned over to a corporate trustee under a Declaration agreed to by the workers and the employer for conserving the funds for a fixed period, at which time the principal is distributed, together with all accumulations to the worker, or, in event of his death, to his personal representatives, together with insurance or other benefits as provided for in the trust agreement.

It is obvious the percentage profit plan may be advantageously used without any supplemental plan; and it is the only type of profit sharing that, without aid of another plan, supplies the one essential element of giving to the worker a substantial interest in the venture.

Some Factors of a Just Percentage of Profits Plan:

No UNIFORM PLAN of profit sharing can be made applicable to all industry under all conditions of economy. This does not, however, mean the factors of the problem cannot be so simplified as to be made the basis of a formula which will do substantial justice to all during the period the situations are similar in the same or related industries.

(1) Capital and labor jointly produce things primarily for consumption and secondly for the making of profits. The contribution of capital to the joint venture is the entire net assets of the association, determined by the average assets used in production during any current year of earnings, including the accumulated surplus and undivided profits which usually are in the form of productive capital. The total cash wages paid and profits disbursed as wages, measure labor's capital contribution to the enterprise for the same period.

(2) Both capital and labor should receive compensation for their respective contributions, which must be regarded as costs of production. The initial return to labor is the total annual wages paid, together with the amounts necessary to pay life, health and accident insurance premiums and medical and hospitalization expenses for the worker's protection, which are deductible as manufacturing costs in the determination of net earnings.

In order to equalize the wage and other disbursements to the workers as the contribution of labor, the payment to the owners of an amount based on a fair per centum of the average yearly capital assets should also be deducted from the company's gross earnings as compensation for the use of their capital contribution.

(3) The net earnings after such deductions should then be divided into three parts for distribution; (a) To the owners as a real dividend; (b)

to the workers as extra or deferred compensation; and (c) to surplus or undivided profits as a reserve.

The amount to be carried to surplus and reserve will depend on the state of development of the venture. In its early years many prosperous and conservative businesses have paid for all extensions out of profits and distributed little or nothing for dividends, but as the venture assumes an established status, the net profits for prudential or extension purposes should decrease. The necessity for this reserve surplus becomes the more evident since the collapse of earnings following 1929 and the universal practice of computing profits of losses and distributing the profits on a yearly basis. Indeed, it has been the income from these surpluses and reserve funds which have given continuity to the venture and indemnity against unemployment when depression imperiled the venture.

(4) The then balance of the net profits should be distributed between the employer-owners and the workers in the ratio that the average yearly capital assets used in production bear to the total rigid or fixed wages paid plus the deferred wage distributed as profits shared during such period.

(5) The distribution of profits to the individual owners should, of course, be based on their respective ownership of the capital stock. The distribution to the individual workers should give consideration to length of service; and to this end be based on average annual wages of his entire period of service not in excess, however, of his earnings for the current year presently distributable.

(6) Since the total of such distribution will be less than the total net profits segregated for distribution among the workers, the balance remaining after such preliminary distribution of profits should then be distributed share and share alike to all workers in disregard of the wages paid to each.

Some Factors of a Sharing Production Values Plan:

THE ABOVE GENERAL PLAN of profit sharing was suggested and amplified by illustration in the notes of the volume on CONCILIATION. It has been modified in many ways during the succeeding years, but its essential factors remain; and the Federal government has accepted its basic elements as

within the regulations promulgated pursuant to the Incentive Taxation Amendment of 1943. While its fundamental justice cannot be ignored, changes may be made in some aspects for the purpose of giving to the workers an enlarged and more intimate picture of the nature of their contribution to the increased values produced by the joint efforts of employer and worker, and particularly, a more immediate and instant realization of the allocation to him, and the present and deferred distribution, of his share of the values produced.

It is obvious that a basic wage must be supplemented by the variable of the worker's share of the profit periodically computed in order to assure a just flexible compensation to all workers who contribute to the increased values produced; and that the feeling of certainty follows the worker's sense of justice and pride of achievement in the joint venture, if he knows the value of his contribution is proportionate to that of every worker and is determined and fixed at not too long intervals.

So it is also clear employer and worker alike realize, in reason and prudence, that the finality of the determination of the production values and the settlement of their equities between the joint producers at the earliest date make necessary: (1) The payment in cash to the worker immediately upon such settlement of a part of his share, (2) the payment of another part of his share to a pension or retirement fund, and (3) the placing of a third part in a reserve fund to supply production values of a given period when less than the wages previously paid during a similar period.

This proposed plan emphasizes the distribution of the flexible deferred wage on the basis of the contribution of production values rather than on profits computed as such. This production value would be determined by deducting from the gross sales the costs of production—(a) raw materials, (b) power and supplies, and (c) allowable deductions for repairs, insurance and depreciation.

This balance, as created production value, belongs to the labor and capital that produced it; and should be allocated in approximately the pro-

portions following: one-third to the workers as additional deferred compensation and two-thirds to capital, with one-third to cover taxes and other of production not deductible in the computation of production value, e.g., compensation to owners for use of capital, and the other one-third for future production and capital reserve.

From this one-third share allocated to the workers as additional deferred wages should be deducted the total basic wage paid to all such workers; and the then balance will represent the net amount of the workers' production credit for distribution to them *in cash*, as a *retirement fund* and as a *reserve* to supply deficiencies and so assure continuity of the plan.

This allocation may vary, and it should be flexible as conditions of economy determine needs; with more concern for the prudential creation of a fund in trust for retirement than for instant cash distribution, and with periodic adjustment of the reserve fund as accumulated surplus warrants or the exigencies of recessive production may require.

No new element has been added by this production value factor to the standard plan of sharing profits as above outlined in 1941. But a difference in emphasis of some aspects, e.g., production values, should contribute to its harmonious workings; since the determination of production values makes monthly or quarterly periods of allocation necessary and fixes definitely the rights of the employer and worker at semi-annual or yearly periods. This plan gives also to the worker a share of the production value, as such, he has helped to create; pays to him in cash and assures his retirement with a fund, in addition to that secured to him by law, in the safe custody of a financially responsible trustee. The worker so becomes a real party in a joint venture and satisfies his pride of service as also his sense of justice.

Scope and Economic Effect of Just Plan:

AN ASPECT of profit sharing of increasing economic significance is too often minimized, if not disregarded. This just sharing of profits involves the continuous distribution to the worker of incalculable millions of dollars which now remain in the treasury of the company or are partially paid out in ex-

cessive Federal income taxes or as salaries to the management or are declared as stock dividends to ownership.

Within the last century, man's utilization of the new energies of power and the mechanizing of industry have changed scarcity into plenty, widened the trails and mud-roads to highways of steel and cement for the commerce of a continent, have transformed the cities of stone into steel, thus supplying structures for industry and homes for the people long in excess but now inadequate for the present needs; in short, have provided for all things necessary for industry and the necessities and comforts of life.

But within the last two decades, economy has witnessed a new phenomenon of mind that conceives a finished and completed world or that lacks the imagination to conceive other horizons or the energy to try new undertakings. During this period, industry, because of the lack of confidence and fear of confiscatory taxation and governmental interference and the realization of the futility of private enterprise, has expended little of its surplus in extension or improvements; and only now has begun to initiate new ventures.

The natural result of this retarded expansion, fear and lack of confidence has been a decrease of production and in trade and an apathy of mind which have been accentuated by the outstanding economic fact that both the recipients of large salaries and the stockholders of cash dividends, the only outlets for the flow of profits into trade and commerce, after payment of excessive or confiscatory income taxes, have little remaining of their incomes to invest in new industries or in the extension of established business. Thus, the inevitable sequel of the present economy of industry and methods of distributing its profits is, that with the payment of excessive taxes on net income the purchasing power of the nation dries up and the vicious circle of the slow-down of production follows the lack of the exchange of products, unemployment increases with attendant demand for goods decreasing, then depression strikes and holds within its grasp the employer, the worker and the public.

Just Plan and Maintenance of Purchasing Power:

THE REMEDY in such depression of economy lies alone in the increase of the demand for goods by the restoration of purchasing power. This can be accomplished (1) by government dole in emergency; (2) by artificial work stimulation on public improvements; (3) by elimination of double taxation of the maker or producer-owner and of the worker as sharer of profits; and (4) by fundamental change in the distribution of profits.

The dole enervates and, while necessary in the extremity of emergency, slowly should be transformed into a civil pension and restricted only to those who, in old age, are entitled to receive it as just deferred compensation for past social service. Great public improvements of a magnitude and nature not possible to be constructed by private enterprise should be initiated and completed by the government alone as emergency relief. But no need of the individual for work nor glory of the nation can justify any public work which competes with or tends to impair individual effort or enterprise.

Courts have sustained the principle of double taxation; but the most certain way to destroy incentive production and to dry up purchasing power is to continue the present injustice of taxing him who makes the profit and them who share it—the owners on dividends and the workers on deferred compensation. Let the maker-producer of the profit alone pay a necessarily increased profit tax and exempt all income taxes on the profits distributed to the owner as dividends or to the worker as incentive compensation *based on his actual contribution to the joint venture as measured by the value of his individual work and service*, and a just method of taxation will increase the value and assure the constancy of purchasing power and the continuity of employment.

The economically sound and preeminently just solutions of this underlying problem of maintaining or restoring purchasing power are: (a) To tax only the maker of profits and abolish the instant injustice of double taxation; (b) to give the workers, as incentive to continue the work, a share in the profits in addition to their fixed wage; and also, as an induce-

ment to the employer to pay such flexible compensation, (c) to permit all funds so distributed to the workers to be deducted from gross income as production costs in reduction of the income taxes assessed on the net profits of production. These may not be the only correctives for the ills of economy that now confront just minds, but whatever plans or methods may be adopted, there can be no final solution without these as essential elements.

The wholesome effect of the equitable sharing of profits on the general economy should not be lessened to any appreciable degree because under some plans a portion or all of the profits in addition to the wage are not presently distributable to the worker. The reason for this is obvious, for the worker then would spend a large part of his wages, certainly that portion which heretofore by him was applied for insurance or saving in old age, since the retention of the profits is for these specific purposes.

What is here suggested is that a percentage distribution of the profits of industry to the worker, in addition to his fixed wage, whether presently distributable or deferred, permanently must increase the purchasing power of the nation and should remove the menace of confiscatory taxation of excessive surpluses and individual profits. The necessity, moreover, would be obviated for imposing a sales-transaction tax, or any additional tax for the raising of funds to take care of the worker whose accumulated contributions must be supplemented by a civil pension if his needs adequately are to be supplied and purchasing power maintained.

Consummation and Justice of Standard Plan:

THERE IS BUT ONE FINAL TEST of the value of all intellectual concepts—the pragmatic ultimate of trial. Will the idea work and is the conduct good, are the questions which time and use can alone answer. It must be assumed experience makes clear to unbiased minds and has demonstrated to those who are without self-interest, that the idea of percentage division of the profits of industry is economic justice, and that the theory offers intelligent compromise and solution of economic problems that now perplex.

The immediate inquiry is the means or methods by which a plan of

profit distribution may be made of more general utilization. Two methods are always available for the consummation of changes in economy—*the voluntary modification by the parties in immediate interest or coercion by the state through governmental action.*

The adaptation of any method is seldom initiated alone by conscious deliberate choice of a group. It is the observation of experience that the practices of trade and the methods of economy originally spring from an original individual mind, and tend to become the general practices by imitation of others in similar situation who detect the superiority of the economy, e.g., the efficiency of the assembly platform and the division and specialization of work.

The only aid that law and government can give to industrial or economic changes is negative, by penalizing the failure to provide the usual tools and methods or to encourage, by *incentive legislative expedients*, the promotion of safety and health in conditions of labor, the socialization of life relations and the equalization of compensation for service. It would be futile for government under our present economy to attempt, by direct affirmative action, to compel those who control capital to share the profits of industry or trade with any group or all the workers whose services are necessary to the joint venture.

The instant solution must be found in the *willingness of the employer to share the profits with his workers*. This, however, does not mean that nothing to the purpose can be done until those who control production come to the full realization of not only the justice of such division but the intelligent self-interest of the practice. Both the state and the employer can contribute their aid in a common effort to prevail on all employers voluntarily to adopt a plan of profit sharing—(1) *the state by incentive legislation and (2) the employer by organization and propaganda.*

First. The most logical incentive is the utilization of the total moneys distributed as profits in reduction of the taxes now imposed on production; and the most direct, simple and workable suggestion is to permit all such distributions to the workers to be deducted as wage costs of production, as

in actuality they are. If this just deduction is found to be of too small value to give substantial incentive, an arbitrary percentage deduction could be made from the net profits or could be based on the ratio of the profits paid as bonus compensation to the workers.

Second. Reforms result only when earnest minds are moved to crusade action, because driven by an overpowering sense of a great wrong and a zealot will to remedy it. A national league of profit sharing companies immediately may be organized upon amending the Federal Revenue Act permitting such method of taxation. Associations of kindred minds who realize the injustices of the present competitive wage system and its attendant conflicts of violence, hazardous to social order and general welfare, inevitably must follow to study and to make clear to all employers the advantage to them and to society of profit sharing as the fundamental of a just economy.

The facts accumulated, analyzed and collated by these institutes of justice, compromise and conciliation should be supplemented by appeal to the duty, right choice and intelligent self-interest of all employers; and through their efforts eventually will come the relations in economy that must give such understandings of justice and of right purposes and equities of profit sharing as in conciliation will make all men proud to work, willing to share and *anxious to serve*.

It may be, however, either employer or worker instead may seek to weaken—for the day is now past when either can prevent—the application of this foundation principle of justice. But whatever the details of a particular scheme, all plans in intelligent self-interest must embody the essentials of a just purpose, under the Federal statute of fair taxation as an incentive of profit sharing, in the formulation of any equitable basic and flexible wage scale under collective bargaining, supervised or decreed by a legally constituted tribunal.

Chapter Six

REALIZATION OF PLAN UNDER INCENTIVE TAXATION

Potential Significance of Plan in Culture, Economy, Governance:

THIS DISCUSSION of profit sharing and incentive taxation adopts the ideas of the author's volume on "CONCILIATION"; and several sections of the chapter immediately preceding, with verb changes, are excerpts from that book.

When those pages were written, the foundations of American polity were in incipient but deepening conflicts with the forces of an alien culture. The traditional concepts of Anglo-American individualism were weakened by an alarming tendency towards centralization of political power and a collectivist economy. The dogma of Marxism, of state ownership and control of production and of community of profit had so revolutionized the functions of taxation in our representative democracy as to remove all constitutional restraints on the power of a temporary majority immediately to weaken the institution of private property, to regiment all industries and to submerge all individuals, particularly the great middle class of thinkers and doers. And neither the collectivist nor the capitalist was fair or frank in his disavowal of a purpose to dominate a strong autocratic government.

The former because the real purpose of his government not only submerges, but crushes the individual in a police state; which was realized in the Russian revolution and now exists as the Soviet Union. The conservative purpose of government by those in control of capitalistic production is to preserve private property and freedom of contract and enterprise. But in fear of the domination of communism, they had accepted the totalitarian states of Dolfus, Mussolini and Hitler; and it required two global wars for

the free governments to extirpate the menaces of statism in politics and in economy.

In the five years before and following 1940, the theories of Marx had so infiltrated, and alien activities had so subjected, Italian, English, French, Belgian and American labor to radical leadership, and government had so dominated production and distribution and had so changed the purpose of taxation from support of government to re-distribution of wealth by confiscatory levies—that the leaders of both capital and labor who believed in individual freedom and enterprise despaired of relief.

Few in America at that time detected the vital relation between the distribution of profits and confiscatory taxation, or discerned the remedy for both evils and the amelioration of other ills of economy, to be in the intelligent self-interest of the employer and his and a government's purpose to do justice.

Understanding, purpose and conciliation are the foundations of social and political life, and are the means by which man has achieved individual self-mastery, group self-government and justice under law. It is an outstanding illustration of the workings of free thought under a free government—that within two years after the suggestion of a plan, without recommendation of the President or discussion in the Federal Congress and alone by force of its inherent justice, a short amendment to the Federal Revenue Act of 1943 provided a statutory incentive to employers to be just to their workers, in consideration of which, the government would be just to them.

This amendment enacts in effect that profits shared with all workers and premiums paid and disbursements made by the employer to indemnify his workers against unemployment and to provide annuities, bonus and profit sharing plans and pensions may be deducted as production costs in the computation of taxable corporate income.

This statute is more than an equitable basis for the distribution of profits and more than a workable stop to confiscatory taxation; for it grants to the employer the privilege of giving to his workers a part of that

which the government heretofore took as taxes and expended for other than governmental functions.

It is one of the most salutary pieces of legislation ever enacted by the Congress; and this because it functions to the end of fair taxation and the achievement of justice in economy among all workers, as well as among the employer, stockholder and the worker. It is grounded on the human trait of intelligent self-interest and has a potentiality in American and ultimately world polity as significant as the discovery of electricity in universal culture and the American revolution in human government.

It is, in fine, the only foundation on which can be constructed the bridge of political and social justice to span the widening and deepening chasm, that now is encircling the globe, between a communistic despotism and a too indifferent, if not grasping, capitalism.

During the whole period of the revolutionary changes in the economic system and political structure of the last decade, public discussion has been limited to the extremes of equality of wealth distribution and regimentation of industry in contrast with the violences of class struggle and the emergence of a totalitarian communistic state. The opponents have spoken, heretofore, only the language of chance survival of the fittest and have regarded human action as only tooth and claw competition, in utter forgetfulness that cooperation is the complement of competition.

Their remedy always has been "either/or" and never a blending or compromise in conciliation. Both had ignored, but now have adopted under American democracy the solution of incentive taxation that must induce corporate management in intelligent self-interest, voluntarily to share the profits with all workers; and thus, assure justice alike in the imposition of taxes and the distribution of the profits of industry.

Profit Sharing as a Facet of Justice:

CONDITIONS DETERMINE and always evidence the type of dominant leadership which at a given period of time the world needs. The priest, calmed the terrors of primitive man; the warrior chief gave order to the chaos of barbarism; the king made a nation out of tribes at war; the thinker con-

ceived and the statesman-lawyer evolved forms of government, first by men then of law; and the popular leaders at last established the rule of the people.

The demand now is for the ultimate realization of Pericles' leadership of courage and justice which will not only give democracy to economy and utilize the machinery of production to highest efficiency; but also, must humanize the conditions of work, meliorate the tasks of the workers and socialize the profits of industry by their equitable distribution among those who labor with muscle and strive with mind.

The brilliant and practical mind of Gallatin in 1794 was the first in America, if not in the world, to make practical application of profit sharing in industry. He gave expression to the full significance of democracy as Harrington had conceived it and repeated, in justification of his profit sharing plan, Harrington's fundamental proposition that: "The democratic principle on which this nation was founded should not be restricted to the political processes but should be applied to industry."

All of these plans of profit sharing, in the large, are based on the ideas (1) of incentive to increase production, (2) of prudential security, (3) of education and welfare and (4) of justice in the distribution of profits as such.

Capitalism is in the nature of a joint venture or partnership relation between labor and capital. There is, however, this paradox, that while a joint venture presupposes cooperative efforts, too often events of friction as to wages, conditions or management of work develops such antagonisms as to suggest as factual the exploitation of capital by labor or of labor by capital.

But possible misunderstandings between labor and capital do not warrant the assumption of either a fundamental antagonism or exploitation. It rather gives the wrong emphasis as to the parties to the joint venture and discloses the omission of the consuming public as a party essential to the harmony that maintains the equilibrium of all the elements of labor, management, ownership and consumption.

It is because man is alone involved in this economy of production that animal conflicts are always present and become the more manifest and accentuated in times of strain. But mere suspicions or intermittent hatreds or sporadic violences do not change much; and certainly, do not destroy the great underlying purpose of the joint venture with its fundamental motive of intelligent choice and self-interest, its cooperative means to the common end and mutual interest of producing goods at a profit for the workers of both muscle and mind and the welfare of all.

It is also urged that a true joint venture does not produce things because the workers cannot share in the losses. Since capital alone pays the money losses, they say capital alone is entitled to all the profits. This conclusion assumes the only determinant of the success of a plan of participation in profits is the payment of losses, and disregards the losses and risks which the workers sustain though they are not of money contribution. The payment of losses is only one element; for since capital is sterile there can be, without labor, neither income nor profit for the payment of labor as dividends or losses.

Moreover, the sharing of profits gives to the workers the incentive to increase profits and, in event of losses, to share them by acquiescing in a wage reduction only because of the harmonious relations engendered by profits distributed in the past and the workers' commonsense realization that profits cannot be shared unless made; and hence, their helpful cooperation with capital in times of stress to restore profits. It is then suggested the worker in reality does share in the losses and risks of industry; in the losses in dollars when his wages are reduced to enable the venture to survive the lean years. "The risk of wage earners is no less frightening and hazardous than that of investors; food, clothing, shelter, and the actual necessities of life are at stake."

While muscle labor does not of itself make the profits either by its sole efforts or by the participation of the workers in the management which resulted in the utilization of both capital and labor, and in this particular the joint venture differs from a legal partnership which assumes actual par-

ticipation of management by all partners; yet it is clear the worker's right to share in the profits of the joint venture should not be denied to him either because of his voluntary relinquishment of the right of management or his wrongful exclusion from management of the enterprise, to the profits of which his efforts contributed.

It must be accepted as sound in theory and a fact in reality that both the work of muscle and of mind are valueless unless employed in coordinated effort, that neither capital nor labor of either muscle or mind can produce profits without their cooperation in economy. Consequently, the men who work with either hand or with mind, those who own or control capital and the public which consumes the goods produced are the parties, who in equity must be considered in the making and in any just distribution of profits, as well as in emergency, the fixing by proper tribunal of the correlated factors of commodity prices and the compensation of labor.

Potential Universal Acceptance of Plan Under Incentive Taxation:
THE POLITICAL and economic conditions before enactment of the incentive taxation amendment outlined in the preceding paragraphs should be supplemented by specific reference to the hardships which confronted two of the foundation commercial activities of our economic structure during the 1929 industrial and financial crisis and the confiscatory taxation and regimentation by government which followed after.

Trust and insurance companies are custodians of the nation's wealth. They are the holders in trust for investment, conservation and prudential use of the obligations which evidence and secure the capital employed in production and trade. The collapse of land, mortgage and corporate bond values and of preferred and equity stocks, took not only incalculable millions of dollars of real wealth from these institutions as owners, but also from their individual owner-beneficiaries. This two-way depreciation of wealth, in other aspects, increased the burdens of these institutions, for thus were absorbed in large measure, if not completely, the sources of their business activities. The number of the estates managed by trust companies had decreased and they had fallen much below their original worth; and

Federal income and estate taxes were taking toll to their accelerating depletion as well as preventing the creation of new estates from individual savings.

All insurance and indemnity companies were not only carrying losses on their investment securities; but the life insurance companies were staggering under disproportionate death claims, increasing cancellations of policies and proportionate decreasing income from premiums; the state and Federal governments had actually assumed a vast volume of life insurance and casualty indemnity and the menace was imminent of the ultimate taking over by the Federal government of all group or individual insurance affecting economic or public relations.

Basic economic changes of enduring value although intended to be remedial only of specific ills, like radical surgical operations, are often curative of other ailments as well as corrective of all related maladjustments and restorative of vigor to the whole structure. So the appeal that induced amending the Federal Revenue Act might have emphasized only the injustices of penalizing the justice of employers who distributed pensions or bonuses to their workers; but there were also minds that clearly discerned the benefits to insurance and fiduciary companies of the nation, and who then detected the real significance of incentive taxation as inducing employers in justice to share profits.

For the ultimate effect of permitting profits, disbursed as deferred compensation, to be deducted as production costs in computing the employer's net tax, both aroused his sense of justice and enabled him to give to his workers as earned additional wages what, without the amendment, would have been taken as taxes by the government.

Sleep did not slide into a fagged soul more gently than this penacea of justice entered the blood stream of American economy. No headlines blazoned its enactment. Neither editor nor commentator extolled its purposes; nor did either private enterprise or organized labor herald it as the solvent of their conflicts; an economist is yet to expound its contribution to

industry and trade; and no statesmen has foretold its destined significance in the economy of mankind.

The obscurity of its birth and potentiality of its justice and humanism might suggest to the religious the teacher's profound concept of a creative mind that strives for goodness and seeks justice. For here, as usually attends the dissemination of an idea of worth to world thought, practical minds of realism conceived the political wisdom and economic need of this amendment. And those of vision and determination, having applied it in intelligent self-interest to life affairs, are now devoted to the enlargement of its humanitarianism among peoples and to its acceptance by governments as one effective way to bar the violences of Marxism and to assure the continuance of the rule of reason in human justice.

A year and more passed before the employers or the insurance or trust companies, in any number, showed they knew the amendment existed. A few alert insurance agents and public accountants first gave practical effect to it, the former to sell insurance and the latter to save taxes for the employer. During the second year, however, its real purpose of incentive taxation or profit sharing unfolded; and since then, under just but properly strict regulations of the Treasury Department, all parties in interest have evolved plans for the distribution of profits not to the advantage alone of employer or worker or public, but in the interest and to the end of justice to all concerned in the production, distribution and consumption of things.

The employers who for years had been penalized for sharing profits were the first to adapt their plans to the amendment. This worthy group, in furtherance of the justice that originally motivated their altruism, now liberalized their distributions, e.g., by increasing the number of participants and basing compensation on services rendered, by lowering pension age limits and increasing the annuity, softening the rigidity of compulsory retirement and adding health and unemployment indemnities.

One shadow has crossed, temporarily it may be hoped, this picture of assurance of just relations between employer and worker. The practice of

corporations to give to workers their corporate stock or options to buy it at advantageous prices on favorable terms greatly should have increased under the Amendment of 1943. The *Smith* decision of the Federal Supreme Court continues, however, to hinder these salutary distributions as incentive rewards. That Court ruled that such stocks and profits realized from the exercise of the options were taxable as ordinary income, as distinguishable from dividends or capital gains.

The hardship of this result is obvious, since both stock and options are not merely the transfer of property by the corporation to the worker, but partake of such incentive deferred distributions as are deductible production costs in the assessment of corporation income taxes.

The imposition of a tax on the workers when the stock is received or when the option is exercised is an injustice that ignores and destroys the incentive that prompted the distribution. It is suggested, the solution lies not in taxing the option, but in applying to both the stock dividend and the stock purchased under the option the rules for the taxation of stock dividends. The tax then by statutory amendment should be imposed when the worker disposes of his stock on the basis of profit, being the difference between the market prices of the stock at the time he received or brought it under the option and when he sold it.

The outstanding economic fact of the years following the amendment, however, is the number of new employers who now share profits under plans approved by the workers and administered by trust companies under Federal supervision. Every succeeding year confirms abundantly the faith of the proposers of this momentous economic change in the innate sense of justice of the American employer and worker alike. Now in the fifth year of its beneficent and enlarging use, the need is urgent for accurate, detailed and complete information as to the growth and workings of the principles that now control profit sharing in our economy under just incentive taxation.

The conflict between the foundation ideologies of the human mind and the resultant struggle for the final rule of one or the modification of

both to the dominance of conciliation for the general welfare is now at the bar of civilization's court of justice. These divergent human traits have summoned to final hearing in world destiny the communism of a police state of authority and the individual strivings of free men in a government of their own choosing. Western representative democracy in government and economy must rest its case on the immanent freedoms of the human mind and its aspiration for justice in all relations and activities of men.

The facts of individual effort and of human achievement are man's only proofs conclusive of the superiority of our philosophy of life and conduct. So the obligation, as of sacred trust, now rests on our leaders of democratic thought and action to apprise mankind of the significance of the contribution that profit sharing, as the last manifestation of purposive justice, is now making to solve the misunderstandings, injustices and wrongs which still harass and frustrate—alone because man is yet an animal.

The pleasing story of the expansion of those plans during the short period of fifty months is reflected in the new fields of activities of the trust companies with special departments now devoted to the administration of profit sharing trusts, and of company security trusts which have contributed to the stability of values of secured and equity corporate stocks; in the stupendous increase in the volume of life insurance and annuities made necessary to provide for the millions of dollars to be paid to the millions of workers as deferred wages and as indemnity against unemployment; and in the strikes settled and conflicts of violence averted by invoking some phase of profit sharing to the appeasement of all parties.

These facts are not yet generally in either the minds or consciences of men; and they in detail should be given to the public in reports of the Federal Treasury and Labor Departments in compliance with a joint resolution of Congress or Presidential order. A national association of profit sharing employers has just been organized which, when supplemented by regional associations, will tell a world society of their way to serve it with justice and so impress the employers and workers of America with a way to avoid the instant peril of the Marxist ideology.

IX

JUSTICE AND RELIGIOUS AND EDUCATIONAL ANTITHESES IN HUMAN INTERESTS



Chapter One

RELATION OF RELIGIOUS ANTITHESES TO JUSTICE

Authority and Individual Belief:

RELIGION is man's first and eternal faith; and his constant strivings for self-realization and character attend his religious, political, economic and social development. Man never has lacked confidence in his understandings with his kind as individuals or groups to whose governance he submits. Nor has he for long lost faith in individuals, governments or religions, no matter how grievous the betrayal of his trust by any of them. It is, however, during the last few centuries only that confidence in popular sovereignty has accentuated and broadened the search for individual freedom and personal security, serenity in religious belief and worship; and but a century and a half ago that Western culture realized its age-old aspiration for a government of law formulated by a legislature chosen by all people of the nation as their own rulers.

Two global wars within as many decades have had to be won to vindicate the faith of humanity in its institutions of political, economic and religious freedom; and now in the effort to extend justice to mankind over larger areas and for longer periods of peace, the world is menaced by an aggressive ideology that would take from it its personal freedom and civil liberties, its individual enterprise in economy and the sacred things of its religion.

Communism under the regimentations of a totalitarian government, in its production of the material things essential to existence, deprives the individual of all of mind and personality he values most; and, in its pretended realistic conception of the relations of men to things and among themselves, it ignores the ideals, faiths and aspirations that have made

possible our civilization and its justice. Marxism with its limitations of sham realism and shallow materialism cuts a large segment of mind satisfactions from the sphere of individual life.

These deficiencies may be supplied only when man's animal wants are supplemented by his confidence in his own efforts to provide for both his cultural development and his material needs, by his abiding faith in free men to rule through a government of their choosing; and by his fixed conviction of the forward march of humanity in quest of the eternal verities of the good and the right. Man personifies these ideals as his God and realizes them in the pragmatic justice that measures all human relations by the standard of just balances and weights that must tend to make brothers of all men.

A cursory survey of religious creeds and institutions as aspects of civilization should reveal: (a) The influence, authority and beliefs of religion in the beginnings of justice, (b) the coincident development of religious, political and economic freedoms, (c) the decline of nations with individual corruption and decay of religious faith and (d) the rise and fall of nations synchronous with justice and tolerance.

Faiths of Religion as Germinal of Justice:

MAN IN HIS EARLY CONSCIOUSNESS began to wonder about his earth, his sky and his kind and to ponder their nature and relation to him; and from the beginnings of that crude wondering and labored pondering came his religion, which seeks to know the first cause and his relation to the all in all and to his fellow man. His idea of God changes with times and place; but all conceptions,^{*} however crudely anthropomorphic or of mystic sublimity, coalesce in the eternal energy of truth and goodness, and differ only in the emergent levels of their unfolding to the mind and of its capacity to realize their values as social forces.

Space defies mind to imagine the vastness of its universes, and time extrudes the threads of life into eternity; goodness is the universal aspiration of purpose and innate necessity of developing human personality; and man in his weakness marvels at his mutation from minutest bacteria of

cosmic speck to creative mind through a pervasive energy. It is because of these notions of fundamental truth that the idea of God—of nature or energy personified as the one source and power of order, harmony and justice—is the dominant influence and formulative force in the life, conduct and progress of man.

The reality of God is not affected by our conception or understanding of the essence; but is revealed in the laws of energy, to which man through his reason must conform. And the kind of rationality his experiences apply to the revelations of nature, which he is permitted to discern, determines the character of his aspirations, the ethical nature of his conduct and the standards of his justice—his conception of God.

Order, morals and justice under the laws of nature are the eternal verities of reality; and the rules of positive law and principles of equity as applied in the actual administration of justice are its pragmatic expressions, which are modified as men and conditions change. There are, however, some foundations of religion which are the essential conditions of universal justice, alike under the laws of nature and of man.

No justice can be formulated as affecting any relation which fails to apply the lessons of experience to the real needs of life; and which also, is not in accord with the certainty of wrongs remedied and evils redressed as well as a serene faith in the right vindicated.

Since religion embraces the whole of man and his every act and thought, and because justice is inclusive of all relations, there can be neither religion nor justice unless man knows himself as both an animal and mind creature of nature; and, also, unless he discerns the laws of nature that govern his individual being in all reciprocal relations of rights and duties.

For under the prescriptions of both natural law and religion, there can be in justice, no right without its obligation. Nature's moral code is imperative, and its justice knows not the grace of religion that sometimes would dull the edge of the sharp steel of *lex talonis* justice.

All associations are religious which are organized in the belief of the

fatherhood of God and the brotherhood of man for making manifest on earth and real among men the spirit of truth and goodness and of tolerance and understanding in human relations. But the social values of churches and other religious organizations have not always been commensurate with their exalted purposes or protestations of human endeavor. The rack and stake, a continent for centuries and civilizations ever in war contending to impose one form of religion on the believers of other creeds, admonish that religious organizations, like any societal institution, in over-zeal may become so anti-social as to destroy the equilibrium of the whole society.

And religious hierarchies, in the extreme of fanaticism, have used the coercions of violence without limit and of cruelty without restraint for the achievement of ends in utter disregard of the spirit of their purposes, however righteous. Religious conflicts have led all other causes of societal discord, because of the universality of religious experience, the assumption of every religious organization that its creeds are the only true revelations of God, and since religious interests and needs, from man's first consciousness, have dominated all other human interests.

The depth of emotional religious stirrings are accentuated when to divine revelation is added the conviction of race superiority, the admonition of race purity or the prophesy of ultimate dominion over all peoples of a race or of a hierarchy in apostolic succession or of an appointed vicegerent of the divine. Tolerance should soften and understanding reconcile the conflicts of opposed religious purposes; not, however, for the superficial reason that the martyr's complex induces the hypersensitive consciousness of persecution and eventually leads to a reaction of vindictive retaliation and of excuse for the use of evil means in evasion of or to overcome the barrier prejudices.

More fundamental and convincing considerations are: That a pure race is unknown to biology, science has demonstrated the error of assuming purity conduces to race superiority, modern religious thought attributes to the interests and needs of a past level of human experience man's futile

efforts to discern the divine choice or to realize a revealed destiny; and finally, because in right reason the favored zealot of today's revelation tomorrow may become the victim of the prejudices and the reprisals of a new interpretation of the divine favor.

Through all recorded time, every nation of world power has passed through its self-extolling phase of being the chosen of God, only in the end to be abased and scattered over the earth. Men have killed and died for what they believed to be the only true conception and right explanation of divinity.

They have yet to realize the eternal sameness and one source of all religions; and that the dominance of religion in governance is not the authority of dogma or creed, but is the ultimate supremacy of justice under moral law as the reason of man discerns it.

The sun rising from the sands of solitude, and passing with the dawn into the canopy of lingering star-studded skies, forced man to contemplate his universe with a cosmic attitude of mind that became impersonal in his belief of the inter-dependent relativity of all manifestations of a first cause—God.

A land and sky, not chance, then gave such purpose to our minds and habits of life as to evolve in larger understanding the great, but not all, religions of mankind from the cradle soil of Asia; and it is the creative human mind alone that can and will lead all peoples to the conception of a universal religion that makes justice the creed, and its realization everywhere the faith of humanity.

Truths of Religion as Fundamentals of Justice:

ALL OF THESE RELIGIONS being born of the same external surroundings and similar inward aspirations have in common and in varying degrees four profound truths: (a) The inter-relation and inter-dependence of man and his God; (b) the suppression of the desires of animal sensuousness and the purposive development of the higher levels of mind; (c) a spiritual aspiration to overcome and to mold material interests; and most significant in group development, (d) a consciousness that social organization results

alone from the self-discipline of the individual and its creation of the dominating purpose of a worthy character.

But religion has yet to forget the fear that inspired its first rites to propitiate an evil deity powerful to destroy. Civilization never really began until the Persian Zoroaster, in the splendor of a belief as golden as the Christ rule of conduct, taught the wisdom and instilled the duty of worshipping the goodness that Mazda had conceived as universal in the human mind.

Hebraic writers make Satan the servant of Jehovah and the adversary of mankind; but it was the Christ idea of the creative mind which has given to mankind the foundation truth that both physical and moral energies encompass us, ruled by the same laws of nature, and which cannot be violated without evil effects to every living or inanimate thing within the radius of its influence.

It is this Jesus teaching of individual goodness and responsibility in realization of human justice, and of which the mind of every man is the master, that is now coming to the heart conviction of humanity as the consummation of its search for a religion of justice; which makes every man reap what he sows of good or evil, and takes from none his harvest share of the material or ethical goods, which he plants and cultivates.

Man has yet to learn the fundamental truth that religious or political or economic mechanisms are not the causes, but are only the means to aid harmonious group associations; and that the enduring base of every religious, political or social structure for his betterment is grounded upon the individual man and the eternal verities which the religions of Abraham and Moses, and of Mohammed, Buddha, and Jesus seek to inculcate. Man must become less the animal and outlaw before he can become one of a social group; which in turn, can improve only as the individuals themselves are induced by religion and are taught by education the better to satisfy their strivings for understanding and justice.

In the conflicts of group interests, the futilities of individual efforts and chaos of economic tendencies, and in the frustrations of human life

and the discords of social relationships, Western culture, and through it one world civilization, needs a spiritual leadership that both aspires to higher levels of individual thought and action and realizes social justice in group coordination. Individual happiness and the general welfare, however, can be attained not so much by sanctions of justice, which restore status and coerce the outlaw to order; but only through the individual's mastery of himself by means of the constant choice of right interests, cultural desires and social wants.

The nations of Europe and of America profess the Christian religion; but the profound wisdom of the philosophy of Jesus will come to them, and through them to mankind, only when in the individual consciousness is aroused the conviction: That his will not become the full life until he understands the creative wisdom and realizes the happy duty of applying the foundation lesson of the Christ, with confident faith and persistent practical purpose, to his own individual conduct and to all problems that confound the nations and perplex all peoples in world relations.

The human mind is the energy that unifies the conflicting impulses of the physical body; and the fundamental psychic fact of individual creative control, which Jesus inculcates, must become the principle that exalts man and harmonizes and humanizes all groups and nations. It is the moral and spiritual foundation on which the individual must build his purposes and ultimately must rest the governmental structures and economic organizations of free peoples, their moral life, group welfare and social justice. Only the individual can save himself and his social institutions by the wisdom that idealizes a human character whose life and teachings partake of the divine.

Coincidental Religious, Political and Economic Developments Determinative of Justice:

THE REACTIONS OF OUR MINDS to material conditions and the interaction of environment and mind determine the fate of our faiths and the future of humanity. The human mind develops and civilization progresses only when something stops or is able to change the continuous flow of vital processes

or frustrates habitual conduct; and we master the menace or overcome the impediment to the attainment of higher levels of thought and standards of conduct.

The significance of a crisis then lies in confirmation of the fact that mankind is still forward-facing and upward moving. The mere existence of an obvious peril in human development is of small concern, but the momentous event is the attitude of mind with which the individual or nation meets the portentous evils that confound the minds and challenge human efforts.

Man has faith in himself and the miracle of his existence is the transmutation of inorganic elements into an organism and its transformation by mind into a personality of ascending levels of intellectual development and moral worth, since his strivings are eternal. It is this conscious seeking in the dignity and confidence of purposive achievement that differentiates man from all other forms of life and is a primary cause of his civilization.

Man became emancipated from the domination of environment and the chains of instinct and free of the regimentation of animal existence, because his mind in dignity has sweetened his work efforts with faith in self-help for self-support and self-development for self-realization.

The civilization of all aspiring peoples followed, in large generalization, similar development—because founded fundamentally upon the mind experiences of self-confidence and the results of self-help. The first records of man are of wars of plunder and aggression against weaker tribes or of defense against less civilized hordes. The racial bloods of the victorious and conquered always commingled in the short interludes of peace, with the emergence of successive cultures at higher levels of struggle.

A more characteristic stage of change, however, is found in man's mental effort to soften and subdue animal aggression in struggle by the individual's striving to act like others of his group and by the group's coercing him so to act—i.e., in the search for a rule of conduct that is right because it is instinctive and customary.

But a righteous custom or just law can become justice only when it is applicable to all; and so, achieving equality of justice is the most significant of all levels of civilization.

It is man's inherent right to act like others, since he seeks group security by conforming with group customs. Hence, there can be neither custom, law nor justice without liberty in the individual and the equality of all so to act; but justice is not certain merely because the individual is free to act and to demand a general rule of conduct. Civilization must devise a tribunal competent to ascertain and to formulate general rules of law with authority to reconcile their rigidity with changing concrete facts to the end of justice. This is the fundamental problem of law and its just administration; and these tribunals of law are determined by the conditions of society and the nature of man for whose governance they are evolved.

Primordial men were dominated by the fear sanctions of religion and it was natural that priests, as secular and divine rulers, should become the finders and judges of law and the administrators of its justice. Thus, the basic relation of religion to law and its tribunals is disclosed as an essential of civilization.

While the divine source and aspect of law become less controlling as man's confidence in his rational processes secularizes the law and divorces its tribunals from religious votaries and rites, there can never come a time when the great fundamentals of religion will not influence, if not dominate, the conceptions of law and the characters of those who embody its justice—for the eternal goods of religion and principles of justice under law are the final rule of supreme goodness and righteousness.

Chapter Two

RELIGIOUS ANTITHESES APPLIED TO HUMAN INTERESTS AS JUSTICE

Justice Under a Dominant Universal Church:

IT WAS SEVERAL CENTURIES before a decadent world of myths and idols fully realized that a new religion moved the minds and hearts of men. For fifteen centuries after paganism ceased its appeal to human fears and emotions, Western culture was dominated by Christianity through secular rulers and religious leaders, within or protestant of the church. During this period, authority and revelation assumed the existence of ordained status and station and of predestined behavior and classes.

A supine people obeyed the mandates of all rulers as interpreted by authority—under the secular law as decreed by a divine king and under the creeds of religion as the revelation of God's will—and all became the victims of the quarrel for supremacy between the popes and the emperors, which ended with the decline of the power of both and the ultimate establishment of strong states declaratory of a nation's will.

Besides the church philosophers, Augustine and Aquinas, the thinkers before the Reformation and during the Renaissance who accepted authority and revelation are the protestants in religion, Luther and Calvin, and the realist Machiavelli. The last urged the necessity of religion as the "support of any civil society"; the protestant creeds of pre-destination and of justification by faith restricted reason, and the church's infallible interpretations supplant it; but all are one with Machiavelli in the conviction that security and welfare are the purposes of secular social organization and that the end justifies the means in the use of power.

They differ, however, from Machiavelli in the end desired and in the nature of the means. Their end is the establishment of a religious society ruled by God's vice-gerents, his is a state ruled by a prince who assumes national power and retains absolute authority by amoral means efficient for the purpose.

As the church and the state were the dominant institutions of mediævalism, so the class system governed its economic structure with its two great classes of lord and serf. The land was owned by comparatively few barons, its tillage was the only industry and principal source of subsistence for the lowly, who were in bondage to it.

These master-serf classes of feudalism became less distinctive as the estates of the lords, through the years, were broken up and came into the cultivation of freed serfs and the ownership of more individuals as commerce expanded and trade increased; with the making of more things by more town and city workers, as the cultural influence and ethical functions of the church enlarged in secular activities.

A great third class was then evolved which was made up of small land owners and free tenants and of the artists and artisans, whose production of new things made them independent of the feudal lords; of the men of business, whose trade and commerce had introduced the new methods—money and credit for exchanging commodities; of teachers, scholars and thinkers, who gave extension to the restricted limits of culture; and most important, of the workers whose guilds controlled and regulated, under the supervision of the church, all production and distribution including the fixing of prices.

Never in the medieval development of man were the mind and the body with their freedoms of thought and action, more completely dominated by the church as state and unit of power than from the tenth to the fifteenth century in Western Europe. The powerful guilds ruled every craftsman, trader or merchant as a subject cog in the machine and not as either a citizen or as a personality. Law, government, science and human culture were all within the keeping of the church, which ruled with com-

plete spiritual dominion and temporal power to the utter extinction of independence of thought or action and the suppression of all opposition, apostasy or heresy, by the ruin, excommunication or death of those of little or no faith—the recalcitrant or disloyal. The church dominated all life until its own communicants as leaders sought to correct its intolerances, corruptions and oppressions, by suggestions of limitations in restraint of its absolute power.

It is to be expected after Luther had nailed his theses that minds of his faith should carry on his reforms; but it is a noteworthy confirmation of the church's contribution to and dominance of the medieval mind that besides Augustine and Aquinas, the priests and communicants, Bernard, Marcellius and Dante before and Vico and Turgot after the violent break with the church, made their supreme contributions to the emancipation of mind. So the church itself joined its reformers in freeing man from the authority of both church and state; and thus contributed to their separation in government and to the recognition of the universality of law for the rule of both individuals and nations, under principles of natural justice as conceived by human reason and ordained by religious, political and economic tribunals of man's own choosing.

The mind most free of intolerance and of subjection to ecclesiastical authority, most fully emancipated from medieval ideals, of greatest moral courage and profoundest intellect, and whose contributions to political and legal thought have been of most enduring value, is the master of them all—Marcellius of Padua. This physician, priest and lawyer lived a mental life centuries in the future. He was the first to discern that the real purpose of the state is the security of order, that the church consists of the whole body of Christians, that the relation between the state and the church involves the supremacy of the former, and that both organizations are composed of the same people in different groups of an all-embracing society. While Marcellius prefers monarchy to a republic, he cautions the monarchs against the assumption of divine favor and asserts the derivation of their power from the people who invested them with office. He warns the church

against interference in secular affairs and urges that supreme authority within the church rests with the general council of both clergy and laity.

An illuminating instance of the paradox of opposite conclusions drawn from the assumption of the duality of human nature, as discerned in religious mutual aid and animal selfishness, is found in Machiavelli's conviction of the necessity of war to defend nations and to expand their power as contrasted with Dante's conception of the establishment of both a universal church and a secular world-state, each supreme within its sphere and the cooperation of both to the lessening of global conflicts.

Thus, Dante anticipates by six hundred years the united organization of nations of present world polity; and he becomes the first pacifist, not in the futile idealism that would not crush the outlaw nation, but in that conception of universal justice that makes abortive its tiger survivals.

Contributions of the Reformation and Protestantism to Justice:

IT WAS THE REFORMATION that finally, by force of open revolt, enabled the individual to emerge from the shadows and again to become a personal force in economic, religious and political life. The third class, with expanding freedom of thought, speech and action, thus finally evolved as the new and dominant power that was to change an old world of mind subjection and physical bondage into a new civilization forever vitalized with the aspiration of every man to be a person of self-help and self-governing, having rights as a man and daring to maintain them.

So, a religious reformation intended only to give the Bible directly to all, to put all in communion with their God and to liberalize the church by strengthening its spiritual appeal and weakening its temporal power, became one of the greatest cultural movements of man's emancipation.

Again is illustrated the fundamental fact of all purposive effort, as first discerned by Adam Smith—that in all our strivings there are implicit purposes never contemplated by us as ends desired. So are fulfilled the purposes of the minds of all men in societal associations rather than of one or a few minds that direct the immediate and instant event. Man proposes and plans, but God is in his heaven and his justice finally prevails.

The contribution of the Reformation is the emancipation of the human mind from authority in both religious and secular government—a freedom of belief and worship and an individualism in government that removed man from the injustices of positive law and the oppressions of absolute power.

But none of the leaders of this revolt against the church aspired to freedom from authority as the purpose of their protest. Striving for free access to the book of their faith, the religious aspect of their protest was dominant; but in economy, the protestants were jealous of Roman dominion over the Teuton and covetous of the encroaching church property. And in politics, they were defiant of individual authority, rebellious against church oppressions and corruptions and the supporters of the state as custodian of the secular power of the rising nation.

The kings, the ecclesiastical hierarchies and the reformers within and without the church alike realized that their avowed conflicts and open hostilities irretrievably had shattered the religious ideal of a universal Christian state-church; and accordingly, all groups concentrated attention solely to the immediate problem of the attitude of the king to the beliefs of the subjects and to the effect of religious creeds on the authority of the king.

Thus, the Reformation weakened, and the revival of learning ended, the edict of Theodosius I that had made Christianity for eleven centuries the one legal religion of the world of Rome; and so confronted man full on with the immediate, delicate and momentous and continuous duty of religious toleration—since now the citizens of a nation and communicants of a church ceased to be one and the same.

Chapter Three

DISERVICE AND CONTRIBUTION OF RELIGIOUS CONCEPTS OF JUSTICE

Disservice of Authority and Contribution of Tolerance to Justice:

CALVIN AND LUTHER accepted the principle of the maintenance of authority, including state regulation of religion; but differed as to the nature of the authority that was supreme. With Luther, the individual was bound to resist the ruler who imposed religious coercion in any form. Calvin, with the popes and Aquinas, maintained without reservation the supremacy of the spiritual over secular authority. Luther's reserved "right of rebellion," his exalting the state and his emphasis of the distinction between the authority of the church and that of the state, no doubt, contributed something to the modern super-state of Hegel; and certainly, made real and vital the Christ fundamental command of a like duty of submission to both Caesar and God.

The ideal government of both the church and Calvin was dominated by their respective hierarchies; but since a "wicked and evil" tyrant might overturn the rule of either, each deemed resistance to be justifiable. They accordingly founded orders—Jesuit and Calvinist—for encouraging loyalty to the creed of each and the punishment of heretics; and such was their zeal that during the ensuing centuries of religious wars, many of their leaders became the assassinated martyrs of Christian belief—for the circle of revenge recognizes no saint, knows no creed and seeks only retaliation in kind.

It requires no rare discernment to realize that something had to be done, as the last decades of the sixteenth and the opening years of the

seventeenth centuries demonstrated the folly and futility of the pious zealots whose demoniacal crimes tended to destroy the whole social fabric. For both church and state governments were fast degenerating into institutions to propagate faith by fear or the violence of power or the punishment of heresy by mass massacre and assassination of the courageous leader, who dared avow a belief different from the religion decreed by temporary power.

The civilized world was now in the agonizing throes of the inevitable sequel to the Machiavellian avowal of materialism and of national power as the function of the state in utter indifference to the creeds of religion. It was more than a miraculous escape from death on Saint Bartholomew's day that made Bodin write the first appeal of the human mind for tolerance based on the powerful argument of the necessity for conserving the order of society in the interest of the secular state.

Such is his understanding of history, such the inclusion in his thought of the essence of Aristotle, the profound significance of Marcellius and the pragmatic realism of Machiavelli—that his is one of the rare minds that, in the extremes of controversy and the blood of religious wars, brings the good of every faith in balance and with tolerance gives understanding to bigotry.

Bodin was the first mind since Aristotle to construct an elaborate system of political theory; and although his book had little effect on the church or secular or governmental action of his day, yet its influence on later and modern religious thought, governmental structure and political action has been constant and profound. In his revival of Aristotle, Bodin defends private property, but contends for its regulation by the state, rather than by the church; and he differentiates between the state and society in prescribing the functions of the former for the welfare of the latter.

He propounds the rule of secular government under positive law and the supremacy of the sovereign state over the power of the church; with courageous acceptance of Dante and in amplification of Marcellius, he avows the development of the nation-state as essential to religious toler-

ance and of justice in the determination of human interests; and recognizing the perils of absolute government, he earnestly demands constitutional checks on all authority. Advocating co-operation as superior to either fear or force, he assumes a continuous development, with the present better than the past and the golden age always in the future. He was centuries in advance in suggesting environment, climate and geographical conditions, and an inner-self by him attributed to Christianity, as the dominant cause of human progress.

Chapter Four

DISERVICE OF A KING'S DIVINITY AND CONTRIBUTION OF LAW OF NATURE TO JUSTICE

Law of Nature as Religious Concept:

THE RATIONALISTIC political philosophies of the profound successors of Bodin's original and courageous free thought have been considered in our discussion of the political antitheses. Consideration here will be given (1) to the tendency of religious belief to extend itself to such extremes that it requires too much of faith and too little of reason to accept its assumptions; and also, (2) to those great religious thinkers, who gave breadth and liberality of concept and pragmatic application to the law of nature as by them conceived.

The doctrine of the divine right of kings evolved from Dante's contention that Caesar derived his authority directly from God; and it expanded with the separation of the church and state and the attendant increase of the secular power of the king. It reached its full power when it arrogated to itself the principles of its divine source, hereditary prerogatives, sole responsibility to God and the abject obedience of the subject—but in utter forgetfulness of justice to him. And these divine rights were grounded on the assumption of the king's descent from Abraham and his successor patriarchs as the source of all political authority of a sovereign.

Grotius was of Dutch and Puffendorf of German birth and both of Protestant faith; Vico was an Italian and Turgott a French communicant of the church; but all four deeply religious minds assumed that such is the nature of man as to lead him, as the creature of God, in an always upward development to read aright the laws of nature and ultimately to adapt them to human affairs.

Grotius adopted the conception of reason as proof of man's obedience to the law in demonstration of the existence of law and as the foundation of a natural law, both of which exist independent of God and are not the expression of his will. Grotius makes law natural to man because, in his adaptation of Aristotle and Cicero, man is both social and rational; the former drives him to association with his kind and ultimately results in the formation of the state. Reason changes station into the understandings of right relations, which is contract as contrasted with status; and in truth, is natural law among nations that cannot enforce sanctions, and is also positive law within the state, because of its power to prescribe and to enforce its principles of right conduct.

The thesis of Grotius is the existence of a law of nations, which he conceives for the purpose of outlawing war; and hence, the necessity of his assumption of natural law. In our tribute to Grotius as the founder of international law, his contribution to positive law should always be in mind—for it is fundamental that there is a solidarity of individuals which is society. There is also a unity of justice and law under positive sanctions of the state, which reason formulates as contractual and purposive in contrast to the status of mere animal development.

Law of Nature and the Creative Mind:

THE THEORIES of law and government of a powerful English mind of the same generation as Grotius should here be contrasted. For Hobbes distrusted the animal nature of man, as Grotius assumed the flow of two streams of justice—among equals and between the ruler and the ruled. Hobbes is the first realist of the philosophy of law, who put the animal nature of man under the discipline of his reason. His whole system of state supremacy over the individual, by covenant of subjection, is based on his emphasis of the innate nature of man and of the survival of those traits that make animal selfishness, fear and security the characteristics of both his personal and societal life.

Hobbes penetrates the envyings, vanities and hypocritical pretenses of men and is on solid ground when he avows they are in association more

from fear, the instinct of sex and the sense of individual inadequacy than from any "gregarious instincts." He fails to realize, however, that the self-interest of all is the fundamental cause that makes men conscious of their own limitations; and thus concession, compromise and service contribute to the intelligent self-interest of all, as larger society or nation of which the individual is a part.

He is right in his analogy of the state to a leviathan; but overlooks the essential fact that the state is a coordinated organization and not an organic personality; and that while the state may rule the individual, it must regard the free personality of the individual constituent as something more than a weaker unit to be absorbed in the leviathan activities of the state.

A distinction well may be made between the fear that expresses itself in instant protection and self-defense and that concern for the future which is more precisely expressed as the prudential desire for security. So also, sex and the complex of inadequacy impel to the family relation as the unity of social life; and Puffendorf is more accurate than Hobbes when he makes the *pater familias*, as the head of the family, and not the individual the unit of primitive society; and suggests future security and not instant fear the impelling force of social integration.

While both Grotius and Puffendorf agree with Hobbes in the change of society from status to contract, Puffendorf differs radically with Hobbes' contractual subjection of the governed to the group that controls and insists upon the mutuality of the obligation between them; and consequently, of the duty of a government of limited power to care for the general welfare. Puffendorf is more in accord with Grotius than with Hobbes in his determination of the good, for his approach is religious. He follows Hobbes in his acceptance of the anti-social and evil as forces in conflict with all social tendencies, but differs from him in his emphasis of utility as the end and religious sanctions as means of law and government.

Vico and Turgot were prepared for the service of the church and both became lawyers. It is more than coincidence that the contribution of each is a conception of government not as potential authority for the main-

tenance of order alone; but rather of a dynamic society ruled by individual creative minds that seek and find the material conditions and physical forces back of social organization that are evolved by the laws of nature.

For Vico "the civil world has certainly been made by man"—and this because, both the individual and society alike are ruled by human nature which remembers experiences, as knowledge; which makes choices of action, i.e., wills conduct; and which moves the judgment to expression, as the power of mental energy. He deduces from this purposive development of man and society his philosophy of unity and theory of spiral progressive growth of human society and its individual constituents.

His is not, however, the idea that the three cycles are mere changes from the gods to heroes, to men and then into decay; but that all life, individual and group, is evolutionary change wherein identity of growth is followed by similarity of decay and that each succeeding cycle is higher than the preceding level. Thus, is anticipated one of the grandest conceptions of the human intellect—an understanding of levels of the purposive, progressive evolution of human society.

Turgot's basic assumption is of a cultural heritage and that mind "is the ladder on which man climbs." His conception of a dynamic mind in social development is of an individual experience and a social memory which give man a knowledge of himself, of his universe and of his errors in adaptation which he purposively corrects and thus progresses to higher levels of social order.

He gave to the sciences of governance and law two fundamental concepts. The first idea was adopted by Adam Smith and directed political and societal thought to the relations of wealth to justice. The other postulate was later accepted or modified by the extreme idealism of Schilling, the categories of Kant, the purposive assumptions of Ihering and Herder, the creative aspirations of Ferguson, the mental levels of Comte, the vitalistic energies of Goethe, Hartman, Ostwald, Bagehot and Ward and the principles of McDougall's social psychology; and all gave emphasis to the dominance of a dynamic mind in the development of men in social relations.

Chapter Five

RELATION OF RELIGION TO GROWTH OF NATIONS AND DECADENCE OF JUSTICE

Loss of Faith in Religion and Nation and the Decadence of Justice:

THE HUMAN MIND is inclined to solve the problems of life relations and development by accepting one cause or method instead of assuming many contributory forces. This is illustrated in ascribing the progress of mankind wholly either to the violences of war or to the blessings of peace; or conversely, in attributing the recession of civilization alone to individual corruption or to the conflicts of groups.

The graph of civilization is in truth not continuously upward, but of both ascending and descending curve. The human mind expands and ascends because the struggle to conquer nature and to overcome contending groups or competing individuals arouses man to greater alertness in overcoming frustrations. This results in producing more and new things and the accumulation of surpluses, which in times of peace are utilized for the comforts of life, the culture of society, the development of personality and the administration of justice at higher levels.

But there is a destructive as well as a constructive side to the shield of struggle and both enervating and stimulating strands in the culture loom of peace. Conflicts arouse passions; wars and competitions of life imbrute human conduct; and the excesses and indulgences of luxury may weaken the body and corrupt individual character to the temporary decline and fall of a culture, but not to the collapse of civilization.

A former President utilized Ferrero's discussion on the greatness and decline of Rome to point out the similarity which he conceived between the

then existent American conditions to the beginnings of the decline of the Roman Republic. Spangler, breathing the smoke and viewing the ashes of the dream of Germany's lost empire detected and prophesied the continuous decline of the West. Wells, the intellectual of a later victorious nation, expresses in his profound outline of history, fear of the collapse of civilization because of the similarity of world conditions now and when Grecian culture passed to Rome, and Roman splendor to the barbarians. Many have rung the changes of this direful theme which some have regarded as a superficial, and others as a formidable, analogy.

The upheavals, however, within the last decades, in world conditions have been revolutionary, the inventions of men for destruction are certain of devastation and annihilation, and pessimism, defeatism and fear have, for too long and in too many ways, depressed the spirit, destroyed the hope and stayed the enterprise of this generation. And so, all reflecting men are impelled to the conviction that mankind is now either on the crest of a receding wave of civilization or in the throes of the birth of new nations at higher levels of life relations or of an organization of united nations, in subjection of the outlaw nation and in creation of new loyalties to universal justice.

The minds of enlarged historical perspective have no fear of barbarian tribes at the frontiers of our civilization. But they are not so sanguine that envy and avarice have ceased to covet; they are certain the sense or conviction of injustice can drive its victims to remedial violence; and they know full well that cultures decline and fall as the individual character of people decays.

Nations become the enervated prey to barbarian hordes of virile purpose—within or beyond their borders—because corruption has corroded the confidence which is the heart of man and a contaminated blood, like a lethal poison, has destroyed the moral fibre of his faith and the aspiring spirit of his being.

This corruption manifests itself in the conventional relations of economy wherein promises are exchanged only to be breached to the enrich-

ment of the powerful and to the hurt of the lowly, as well as in the bad faiths of governments to their citizens and allies in repudiation of obligation or in confiscation of property and conquest of territory. It extends itself to the administration of justice when judges are appointed from opposing groups, hateful to each for their appeasement, or the aggrandizement of executive power, by placating conflicting political, economic or religious interests and bartering favor.

It confiscates under guise of taxation the surplus of the producer of things, who saves and uses past profits in the continuous creation of new capital; and it takes from both labor and the leaders of economic effort the foundation virtues of life endeavor—thrift, initiative, industry, enterprise and confidence in self and others. It becomes arrant in the political structure, and changes citizens once proud of national traditions and personal birthrights into servile mendicants.

It transforms patriotic and righteous servants of the people, loyal in their service and devoted to their duty to the state into pliable judges, designing demagogues, mercenary legislators, avaricious leaders of industry and rapacious labor chiefs in civil strifes of contending violence. Ultimately, all individuals of the corrupt society become the victims of covert frauds, of successive proscriptions or of retaliatory fears of power administered as justice under the shell of a representative government by base men who profane its holy places.

This corruption finally and at last destroys the faith of the people in their nation and in their religion, the worship of which made sacred the family unit of the state. Thus, the vital cord that binds the citizen and his loyalty to his government is severed as strange cults and intellectual agnosticism supplant the works of devotion and destroy the worship of the God of their faith and their confidence in the justice of their fathers.

Contribution of Justice and Tolerance to the Growth of Nations:

IN EARLIER GROUP CIVILIZATION, every tribe was jealous of its divinities and persecuted the worshippers of foreign gods; but conquest enlarged the sphere of the conqueror's power, and as early as fifteen hundred years be-

fore the Christ, there are intimations of interludes when the religions of Egypt tolerated and even absorbed the gods of subdued tribes. Such tolerance, however, was not for long, and Exodus describes the first flight of a people from persecution for worship of the One.

So, the beginnings of recorded time open with the story of man's inhumanity to man because of his religious creeds—a sequel as inane as it is pathetic, since belief is beyond the control of will and is learned at the knee of a destined mother. Religious hate has persisted in all cultures of civilization and has harried humanity through the centuries; but with fury abated for longer sporadic periods of tolerance when the avowedly religious wars ended three centuries ago. Within the last decade, however, its poisonous fangs struck in the Nazi abhorrent extermination of helpless millions of Jewish faith.

A law of just compensation has attended civilization as religious liberty has been granted or denied to mankind. The history of man's material development and cultural growth confirms the generalization that nations have attained their greater power, their more diffused prosperity and comfort and their higher levels of culture when religious liberty is a generally accepted attitude of the mind; and that civilization declines and men decay with the loss of freedom to worship what they deem sacred.

Egyptian splendor followed its absorption of foreign religions, but confusion followed the persecution of the Jews and their flight from bondage. Hammurabi's code of religious tolerance was coincident with the development of his empire, but religious persecution by his successors attended the decline and fall of Babylon. A contributing cause which made Persia the worthy foe of Greece was that Cyrus permitted the religions and culture of Egypt and Greece to be a part of the life of his people; and Akbar, twenty centuries later, by edicts of tolerance cemented the many religions of India into the greatest empire of the near East. But a jungle grew over the ruins of both Persia and India when the successors of Cyrus and Akbar revoked the religious freedoms at one time granted.

All cults worshipped in Rome when she ruled the world; and China,

the oldest continuous civilization of man, was tolerant of every religion of both the East and the West. Like Turkey, however, material and spiritual development of every of these states ended and dismemberment began when the Christian became the martyr of the Roman arena, the old Queen Empress fomented her Boxer massacre and Hammed put to the sword the Armenian Christians.

Spain, France and Germany in sequence dominated the commerce, economy and politics of Europe coincident with the grant by each of a degree of tolerance to Mohammedans, Jews and all non-Christians. But Spain lost her life blood and empire when she expelled the Moor and Jew; France sounded her knell of European dominance on St. Bartholomew's Day; and no nation in the history of man so completely wiped from the face of the earth all that was of cultural worth and fine in its people than did Germany when her mad-men committed civilization's latest and most horrent crime—genocide.

He has read in vain the annals of man's struggle for government by free men, who fails to see its source in his eternal aspiration for religious liberty—of worship as his kindly light leads. It was more than coincidence, as authority slowly was passing its power over to the conscience of man in matters of religion and state, that a virgin continent of an unknown hemisphere should beckon the old world, oppressed of body and spirit.

But its barren shores were more hospitable to the seekers of free worship than were the martyrs of the old persecutions to those whose religious beliefs and practices differed from their own. Only Penn's followers of Fox, Calvert's band of Catholics and Williams' heroic sufferers for conscience rendered unto dissenters the tolerance which they sought for themselves. The Church of England in its adherence to tradition and the Calvinists as the elect of God and even the valiant ones who landed on Plymouth Rock had no scruple to persecute those who did not accept their faiths.

Roger Williams was tenacious of his religious faith when he resignedly accepted expulsion into the woods, and in courage finally gave to civ-

ilization, in avowal of his deep conviction, a new fundamental truth of human liberty—freedom of conscience and of worship. There is a vast difference between freedom of worship and mere tolerance; and the mind that conceived and the spirit that promulgated in foundation law the change from tolerance to the liberty of belief and worship, gave an enduring contribution to human thought and justice. The constitution of Williams is the source of the right which the Federal Supreme Court has just affirmed—of the Catholics and Protestants, Jews and Moslems to think and worship, or for the atheist not to worship, as their consciences impel.

Chapter Six

RELATION OF EDUCATIONAL ANTITHESES TO JUSTICE

Education and Individual Action:

INDIVIDUAL PERSONALITY, in any educational culture, must be developed and preserved against group dominance. The true function of education is the training of the individual to the right appreciation of the values of conflicting interests to the end of understanding conditions and of wisdom in the choice of interests which determine wants. Its sequels are the creation of purpose, the formation of character and personality of the individual and his formulation of fundamental concepts of his relations to the state as a citizen bound to act for its general welfare. Education cannot make individuals either good or public spirited or wise; but it should make them inclined to do what they ought. While it may not be able to instil the duties of goodness, education can lay the foundations for forthrightness, and join with religion in giving to the individual that understanding which is the beginning of wisdom and purpose of justice.

It is the function of education to draw from every individual the best expression of his personality to the end of his happy and just adaptation to always ascending levels of culture. It trains for both the character of the individual and the welfare of the group; and only incidentally, for the mere acquisition of knowledge, culture or discipline of the intellect as such.

Educational interests are the real conservators of civilization. They change the mind of animal man into a purposive human being, control and direct his habits, mollify his emotional urges, mold his whole organism in right reason to the inclination of prudential choice and pass finally to every individual, at ever ascending levels as a heritage, the experience of ages—

the lamp of civilization that lights the path of all seekers of freedom and justice.

All problems of life and association arise from the biological fact that man is a duality of animal and mind, and of self-serving and social inclinations. It is the mind of man that makes him different from other animals and humans, and gives to him an individuality which he develops into a personality distinctive in group association. The eternal struggle between animal and mind propensities results in antitheses of human nature which give rise to many unsolved problems of life's contrasts—of sin and righteousness in religion, of evil and good in ethics, of violence and order and of the meliorists and the anti-social in society, of those in conflict and co-operation in economy, and of antagonisms and conciliations in law.

The individual as the heir of ages of group association is also the descendant of unnumbered ancestors who gave to him at birth a mentality with which he must adapt his organism to an enveloping environment, the nature of which he alone determines; since his individuality, fixed by heredity, alone sees and feels his external contacts. Thus the personality of every individual depends upon the inter-action of inherited tendencies and the contacts of environment as expressed in the personal interests and desires embodied in his peculiar organism. Since we see ourselves reflected in the minds of our associates, the desire for their favor makes praise and blame the fundamental determinants of the personality's choice of interests, and, consequently, of the purposes and motives that impel action.

Justice and Antitheses Between Individual and Group Character:

EDUCATION DETERMINES the quality and persistence of our interests, the constancy of our habitual thoughts and the nature of the action induced by the choice of our purposes and personalities; which in turn develop our individual characters.

Education and character are lifelong processes and results; and both are made possible by prolongation of the period of infancy, by social contacts with other minds and by the enforced discipline of the adults acquiring a knowledge of the experience of mankind.

"As the * * * human being * * * if * * * deprived of * * * human companionship would develop * * * a very rudimentary idea of self," so personality may become a chameleon-like character if opposition and competition do not intensify the individual's self-awareness, stabilize his strivings and stimulate the emotions to determined and persistent action. The long helplessness of the infant may be stressed as not only a differentiating characteristic, but also as a source of mental growth and social education as well as a primary cause of the development of human character; for it is during this period the pliable animal instincts are transmuted into habits first by imitation, then by deliberate acquisition of right habits into an organized habitual life, that gives the drives of character to continuous right action.

The acquiring a knowledge of the universe, of the past experiences of man and of his tools and relations ends only with death. For while the adolescent period of greatest discipline is coincident with the learning of spoken and written language and during the years of compulsory school attendance and although the disciplines may diminish with the years of passing maturity, yet there is never a time when the human mind ceases to learn from new environmental contacts. Indeed, the minds of greatest intellectual power and rarest creative genius become with the years the more curious, penetrating and profound and their characters as the granite.

Justice and Personality as Determinants of Development and Progress:
MAN NEVER ASPIRED to higher levels until he came down from the trees and began to walk on the earth. In the growth of humans there dawned in one mind of originality a paramount choice which so absorbed his being as to create the irrepressible desire to walk in a new way. This want expressed itself in conscious effort which trial and error repeated to successful habit; and habit, encouraged by praise and stimulated by blame, developed into the acquisition of a revolutionary method of locomotion for one individual of character.

Imitation through and by the educative tools of curiosity, praise, blame and mutual aid ultimately took all humans from the trees and gave to man

his characteristically erect stance and walk, the development of which was encouraged and made easier by the accumulated inherited tendencies of every successive generation. Thus, purposively the human body was changed and a social heritage was created, which found eternal expression in character—an analogue and prototype of the contribution of purpose and character to all individual growth and social progress.

It is then a fallacy prolific of erroneous applications to assume, because association develops personality, that the group creates the individual and "personality is not a prime emotional element in human affairs." Back of every individual action or movement of any group or conflict of classes or struggles of individuals, is the purposive mind of man striving for satisfaction of wants, which are his personality's choice of the interests his will demands shall be realized.

It is contrary to both the factual record and our conception of the growth of the human mind to limit the possibilities of either the extent or the scope of its operations. Neither the magnitude nor the nature of contending wants in the forward struggles of mankind can take from its group conflicts or mass collisions either the mind energies of the personalities that have directed, or the supreme force of the wills and the exalted nature of the characters that have dominated, the results. *Human individual character, and not chance, determines the nature of the whole group, however vast, and of its movement, however complicated. Character and personality give to both the group and its movements the meaning of purposive effort in the eventual direction of progress. The economic history of class struggles is only one record of the purpose of man's mind to become less the animal and more the human; and it is his personality that his character impresses on the human race as the permanent record of the higher levels of individual and group life.*

Justice as Synthesis of Education and Law:

THERE CAN BE NO LIFE without environmental adaptation nor development of human life without harmonious adjustment, which is the function of education. Since adaptive strivings continue the life of all organisms, the

conscious efforts of human education are without purposive result unless they give to man a better, higher and fuller life development. Thus this comparison of relative life developments makes necessary the evaluation of life interests.

The primary purpose of education is neither the good nor the happy individual, for the former implies an absolute standard and the self-righteous exceptional teacher, and the latter ignores group harmonious relations; but rather its real purpose is to give to every individual some conception of the cosmos, an understanding of its nature and an appreciative sense of relations and their moral values as exemplified in the dominant purposes of life.

It may be futile to seek the inculcation of wisdom in the choice of these values by arbitrary precepts; but education must give, to an always enlarging circle, a knowledge and an understanding of the experiences of the human race as to the nature of the universe and of the good, the useful, the true and the beautiful to the purposive end that individual intelligent self-interest may make the choices of those interests which conduce as well to the happiness of his full life as to the social security and the group welfare.

Public opinion is the force and government the master machine for the repression of the animal instincts and the development of mind for its control of action. Education and the law are the practical instrumentalities of experience for giving to the individual an understanding of right relations, to his groups the stability of order and to his universe the potentialities of life progress. The means by which these ends of civilization are achieved are the development of right habits through education and the compulsion of right conduct by legal sanctions. Of these, the mechanism of habit is more efficient than the prohibitions of law, since the former gives the desire and also inclines the mechanism to act in a certain way and the latter are only checks on habitual conduct which are futile when premature in their enactment; as when education has not so trained the individual and molded public opinion as to make the condemned and unsociable habit both pliable and amenable to the new rule of action which the law promulgates.

Education and the law conserve the experience of the race, education being more the preserver and the transmitter of its traditions for individual development and the law of its customs as affecting his group relations. The race has recorded its good and useful habits; and so has been created a body of concepts for right action whose precepts education inculcates and whose principles the law seeks to enforce as necessary in economy, essential to social welfare and imperative to the maintenance of order.

Since action is always in a state of becoming and the actors change with every successive generation, the use of precept or principle is only to make reasonable the right action and to give an understanding obedience to its enforcement. The great need of the law then is that education shall make the socially good and useful actions so habitual in the early years of every individual as to give pleasure in their mature performance, for actions are modifiable by the choice of interests and the satisfaction of desires which give pleasure and avoid pain. Neither precept, principle, reason, appeal nor punishment of any nature will supply the deficiencies of character induced by the neglect of religious and early home training and the failure of state education to make habitual the pleasures of right action.

Justice as Separation of State and Religion in Education:

THE PRINCIPLES OF ACTION that inspire and direct human development come from the exalted characters of creative secular and religious thinkers. It is their ideas of life and precepts of individual conduct for the advancement of human freedom and justice that become the aspirations of humanity to make real their teachings of the right and good. The rules, however, that actually govern men in all relations arise out of the jungle conditions and self-serving interests and altruistic impulses that environ and move from them.

The positive laws of states so evolved from human strivings and aspirations amidst the struggles, wrongs, and inhumanities of economic, political and religious conflicts are then the pragmatic solutions which the few tolerant and just minds conceive in their efforts to restore order and reason to a society embroiled always in strife and intermittently in wars for political power and of religious hatreds or in defense of the everlasting things of civilization.

When an intellect of penetration and might discerns the vital need and formulates a basic principle of justice to end atavistic violences, the instant question involved ceases to concern only the political and religious interests which initially provoked the conflicts, and immediately becomes centered in the maintenance of the eternal principle his exalted character proclaimed as the essential of civilization.

The First Amendment to the Federal Constitution against "the establishment of religion" was made a prohibition against the states by the Fourteenth Amendment; and so, both governments are prohibited (a) from preferring one religion over another and (b) from giving any assistance to all religions.

Justice Frankfurter in the *McCollum* case repeats the conviction uttered in the epochal *Everson* case that: "We have staked the * * * existence of our country" on "complete separation of state and religion." He recalls that Elihu Root characterized this as "the great American principle of eternal separation between Church and State"; and admonishes in the words of Jeremiah Sullivan Black that "the manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics."

There should be neither doubt as to the authority or meaning of Jefferson's "wall of separation between Church and State" nor clash "of views as to what the wall separates," so long as mankind remembers that this basic principle was imposed upon peoples not as a law against their protest; but, during religious wars, mass massacres and assassinations of and by zealots, was avowed by the profound intellect of the lawyer Bodin. It was adopted by governments and willingly accepted by the votaries of all creeds as the necessary means and only way to conserve the order of society, to protect faiths sacred to individuals and to preserve the supremacy of the secular state.

This desideratum of separation so vital to the security of society will be accommodated to Western cultures and particularly to the parliamentary structures of constitutional governments only if just minds continue,

as in the past, to give full and free consideration to facts known to all and their earnest approval of some reflections so obvious as to escape the observations of only the unjust, who would feign impatience or affect irritation with the conviction of the righteous: That the aspiration for justice is an inherent law of human action.

Education developed and diffused Western cultures under the almost exclusive instruction of religious teachers. The primary purpose of their lessons was to prepare all for a life after death and in life to mold the devotee to obey dominant church authority.

Bodin's appeal for universal tolerance and his bold demand for the separation of religion and state made the secular the dominant power of government, and changed the very foundations of Western cultures from authority to freedom and presaged the revolution of thought and action that finally gave to mankind free secular education as the one trusted guardian of free men.

The separation of education from sectarian influences and establishment of secular schools as a bulwark of individual freedoms did not result from antagonism to religion or from prejudice against any sect or belief; but was the sequel of Bodin's tolerance and the response of devout Christians to proposals in the several states to separate secular from religious education, and so to save religion from being rent by creedal conflicts.

Jefferson's metaphor cannot rule as an absolute; for he said the *wall* of separation "was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by public authorities, as indifferent to the interests of society."

Madison's Remonstrance breathes the conviction of a deeply religious mind. The writing into the constitutions of all but few of the States of inhibitions against the use of public funds for sectarian purposes, and the failure to adopt a similar amendment to the Federal Constitution alone for this fact, make clear the things to be separated from secular education are the symbols, ceremonial practices and creedal teachings, by remotest and most sensitive suggestions, of all sects, beliefs or faiths.

The facts that Jefferson did not exclude religion in its general aspects from the University founded by him; that a knowledge of the sources of all world religions and of the nature of their contributions to the development of man and the growth of the institutions of his civilization cannot be omitted from the curriculum of any school of universal education; that the Federal government in many ways at its founding and throughout its existence as a nation has aided all religions that personify the good and the just and deify a personality, but is nonsectarian; and finally, that the proposed Blaine amendment to the Federal Constitution, regarded as the most drastic means for enforcing separation, explicitly did "not prohibit the reading of the Bible in any school or institution"—all admonish that a decree of the Court "prohibiting all instruction and teaching of religious education in all public schools" is without guidance as to "when the secular ends and the sectarian begins"; and that the conclusion of Justice Jackson in his concurring opinion in the *McCollum* case would seem inescapable: That "it is a matter on which we can find no law but our own prepossessions."

Justice Reed in his sole dissent in the same case says that this is not an absolute "prohibition against every conceivable situation" of religious education; and that the "Court cannot be too cautious in upsetting practices embedded in our society." It is suggested that while the inclination of the Court is to sustain state legislation which deals "with the important social problems of its population," yet the foundation rule of separation rigidly must be enforced, if the eternal principle of religious liberty is to prevail and the security and order of society are to be maintained.

It is assumed that in the difficulties attending the establishment "of a definite violation of legislative limits," the Court finally must decide if and when the *State* is without *religion* and the *Church* is without *politics*. If the Court ever should fail to determine with justice that either the State or Church has used the other "*as an engine for any purpose of the other*" all five institutions, state, church, religion, politics and the Court, then will have become the useless, because untrustworthy, if not corrupt, mechanisms of a decadent culture which, however, civilization may survive somewhere and at some time with its restored higher level of justice.

X

JUSTICE AND POWER

Chapter One

JUSTICE AND LIMITATIONS ON POWER AS DUE PROCESS OF LAW

Individual Freedom and Social Limitations Under Government:

CONSTANT CONFLICTS among different levels of development result from the inertia of an existing society, the degrees of emergence of new wants and the vacillatory public opinion which urges the new or supports the old; and so control of group action and supervision of individual conduct become the ends and purposes of organized society. Society did not just happen to develop into an organized structure. The function of the human mind continuously has been the adaptation of organism to environment by the dual process of bending the external forces of nature to man's uses, and his striving to subjugate his animal nature in restraint of its impulses.

The whole conscious history of human development confirms the assumption of the progressive evolution of human character by the creative energies of the individual mind and the co-ordination of groups through organization of social tendencies. The purpose of group organization is then social control of both the association and its members; and the struggle between man and the group as a state and the power of its government never ends. The freedoms of the individual become his civil liberties only as the power of government is recognized, with its legal sanctions under fundamental law restraining the anti-social inclinations of individuals or groups.

The basic differences in governments, as in individuals, result from the nature of the limitations which each imposes on its control and power; and the real differentiating factors between a free and arbitrary govern-

ment are: (1) The purposes of those who control its functions in the satisfaction of its social interests and (2) the manner or method of exercising such control—whether by absolute power of autocracy as in Russia, or by distributed powers in balance as under the Federal Constitution. Our Founders were determined to establish a representative democracy with defined powers expressly granted by the states to the Federal sovereignty, and all powers not so granted were reserved to the states or to the people—with power limited under checks as between the governments of the several states and the United States, and in balance among the executive, legislative and judicial co-ordinate branches of both state and Federal governments.

The powers of government are either affirmative or negative in function; and there always has been diversity of opinion as to how far governments may go beyond performance of their negative police duties and the degree to which they may become instrumentalities of social welfare and progress. The balanced judgment of Mill is illustrated when, after stressing the negative character of human liberty, he realizes the absolute necessity of government control of the individual; and, emphasizing the experimental nature of all efforts to regulate private enterprise, he concludes that "one side is * * * as often wrong as the other; the interference of government is with * * * equal frequency, improperly invoked and * * * condemned."

The Federal Constitution assumes four fundamentals in its definition of the affirmative functions in the sphere of social control of individual freedom through the mechanisms of government. (a) The Federal sphere of delegated powers affects the national defense and the people's welfare as sharers of common traditions and similar aspirations. (b) The reservation by the states and to the people of all powers not delegated impels local governance in all things affecting social relations and police regulations. (c) The grant of specific powers by the people to both Federal and state governments educes control under due process over physical and external environments of the individual, e.g., with paramount Federal control

over navigation and commerce and, when affected with a public interest, of production and economy. (d) Limitations on government under a Bill of Rights, which inhibit domination of the human mind and bar interference with its freedom to think, to believe, to worship, to aspire, to assemble, to discuss, to communicate with other individuals; and with them, except as to the Federal guarantee to every State a republican form, to determine the functions of their government and to choose and change the representatives of their sovereign power.

Restraint on Power as Basic of Human Freedom and Government:

MAN CANNOT IN REALITY be free unless he is both self-confident and self-reliant. When something is done for him which should be done by himself, his sense of dignity is affected as the favor of another, or of the state, lessens his pride in his worth and his faith in his effort. The state is bound to maintain order that all may have equal opportunity to work and to achieve; but no government has a duty to provide the means of life, except to the worthy as deferred wage compensation or under the general necessity of declared emergency. Individuals, as workers, are weakened and, as citizens, are corrupted when a government invites or tempts them to barter either personal or political liberty, or both, for food or shelter security.

Political may be distinguished from personal freedoms, in that the former assure to the individual the right to choose his kind of government and the latter connote his civil rights under the government of his choice. It is the lesson of history that in the pioneer stages of every successive culture such has been man's confidence in his capability to provide for his satisfactions that the state gave small concern to his personal needs. It was only when a less robust individualism began to lose the self-reliance, which made it originally free, that in later fear and final dependency it has been willing, as the competitions of life became intensified, to trade either liberty for personal security to the certain loss of personal liberty and the gradual submergence of both security and political liberty in the dole of a totalitarian state.

The inevitable sequel of this exchange of individual freedoms for free-

dom from fear in anticipated security is that as the franchise of citizenship becomes universal, the sovereign power tends to autocracy; and the forms and processes of government partake the more of pure and the less of representative democracy, as the will of a tyrant majority instantly becomes the law of the land—and this without check of constitutional limitations and whether the legislation was motivated by benevolence of dominant groups or self-aggrandizing confiscations by them enforced.

The wisdom of Macauley's prophesy is not that the Hun and Vandal menace to the American representative republic "will have been engendered within your own country"; but rather, is his discernment of the real cause that must produce these instrumentalities of mischief and ruin. When he admonishes that the individual agencies of our destruction will be created "*by your own institutions,*" he could not have had in mind the structure of the nation as then ordained by the Federal Constitution; since for the first time in human history, it protected man from authority under a government which derived its full powers from the consent of the governed. He knew the American colonists had been the victims of the excesses of government, and that the foundation purpose of their Declaration and Constitution was their liberation from too much government. This result had been achieved through and by a constitution which granted only *necessary powers* to the executive, legislative and judicial branches of sovereignty under *explicit checks*, and the *absolute reservation* to the people of all powers not expressly granted.

Gibbon gave his story of the decline and fall of the world's most powerful republic during the decade the Fathers of the Constitution of the United States, seeking the aid of its profound lessons, had founded their representative republic upon the basic idea of the control of power—even by restraints on the people themselves. *This concept of limitations on government as the fundamental of individual freedom is distinctively the contribution of America to human governance.* Macauley probably uttered his dire admonition in the fear that, as in Rome and with every people in the history of mankind who had traded liberty for security, a government by

will of an unrestrained majority would supplant in America the government of freedom under balance of law established by a majority but limited by constitutional checks.

Restraint on power is then the foundation of American freedom under Federal foundation law. To the mind of John Stuart Mill "this limitation is what they meant by liberty" and what John Adams called the "guardian of the land." This signifies not only that a restraint removed on any branch of government is a freedom lost; but in the words of Chief Justice Sharswood's observation, in criticism of Blackstone's synonymous use of political and civil liberty: "*That law * * * may be a tyrant, whether enacted by the will of one man or by a majority of the people * * **. (For) whenever laws attempt more than is necessary to secure alike to every man * * * the moral powers of seeking his own happiness in his own way, they invade the natural liberty of which they ought only be the bulwark."

Almost a century after the promulgation of our constitution, the Supreme Court asked: "Whether it is not wiser that this power should be exercised by one man than by many," if all that an individual has of happiness and security is placed "*under the unlimited domain of others?*" President Lincoln gave the only answer, up to then, America had ever made to this fundamental question of just government, when, in his first inaugural, he said, "*a majority held in restraint by constitutional checks and balances * * * is the only true sovereign of a free people.*" Lord Acton, a few decades thereafter, gave to Western cultures the most certain test by which to judge whether a country is really free in these words: "*The amount of security enjoyed by minorities.*"

Without questioning the wisdom of this test, there have been members of our appellate courts who would seem to repose confidence in the assumption that a more democratic control of government, by the removal of checks on the several branches of government and the absence of any restraints on the power of the majority, can do no harm to minorities. *Whatever the attitude of the courts as presently constituted, it is clear that the checks and balances of our constitutional system disclose the Founders'*

great distrust of unrestrained government translated immediately into action by a majority in numbers of its citizens.

"The Framers of the Constitution did not believe * * * any man or body of men could safely be entrusted with unlimited power." And "all experience justified them in thinking * * * human liberty could not support the temptations which unlimited power always brings." It was only by keeping their power to themselves and placing checks on the exercise of even this power, that the people retained their liberties; and thus limitation on power was the constitutional method of restraining the majority of any minority that in temporary control of government sought to abuse its functions.

"A just estimate of that love of power * * * which predominates in the human heart is sufficient to satisfy us of the truth of this position." So said Washington in his Farewell; to which Jefferson, writing the Kentucky Resolutions of 1798, adds a touch of finality with the blunt, "*let no more be heard of confidence in man but bind him down from mischief by the chains of the Constitution.*"

Now this distrust of government, as the lesson of experience, is also the psychical reaction to fear of the unfamiliar. Ignorance is the breeder of suspicion and fear. Through the centuries man had known only the injustices of those who ruled him, but he must have searched for the causes that put him in chains and pondered the loss of individual freedom of which he dreamed. When, then, in the final realization of his aspirations he became the maker of his own government, the folk-way fears of the centuries persisted. Hence, in the wisdom of experience and in ignorance of the machine of his own creation, he determined to keep the control of government to himself; and thus make certain the retention of his personal liberty and the power to execute it, which is as perfect as the right itself.

Even in collectivist Sparta, the Ephors retained some individual freedom; the Athenian protected many liberties for himself; the Twelve Tablets preserved both personal rights and Roman order; and throughout the Middle Ages, there were sporadic efforts of the individual to temper power

and to loosen the enmeshing net of government, whether feudalism or monarchy. It was not until the promulgation of our own Constitution that man emerged from the group in which he had always been submerged; and government was barred from invading the natural rights which are immanent in the individual.

Thus and then were consummated the four most vital contributions of the mind of man to his individual and societal development: (a) A free government; (b) under a fundamental law with limitations on the power of the citizen and of his rulers by representatives of his own making; (c) a judicial branch embedded therein, which defines and applies definitively due process and equal protection as the supreme law under constitutional prescriptions and the limitations sanctioned by settled usage both in England and this country; and (d) an individual free mind as a conscious purposive force in the political, economic and societal development of humanity to higher levels of intelligence and conduct.

It was these instrumentalities and functions of government and this force of the human mind that have transformed a world of material things, of which man was the victim of absolute power or of the Fates' blind orderings, into a society wherein he is the master of his destination, if not his destiny, whether he realizes it or not—for he has builded better than he knew in the definition and administration of his justice under due process of law.

It is this realization of justice under the processes of representative democracy that is the contribution of the creative mind to Western culture; and the most stupendous achievement in the development of man is the diffusion to all peoples of the world during the twentieth century of Western individual freedoms and aspirations for justice. This epochal event touches great mass segments of minds steeped in status, and now so affects their behavior and manner of life, changes their beliefs and ideologies and has so aroused their wants as to move them to aspiring action against any forces thwartive of their strivings for what they conceive to be their rights under governments of their making.

Chapter Two

SPECIFIC INHIBITIONS ON POSITIVE LAW

Constitutional Limitations:

THE WISDOM of the foundation law of a state lies in the kind of basic restraints it imposes upon the people who formulate it for their governance; and upon the government, that both enforces and must obey the limitations ordained in the three aspects of *positive law*. A constitution becomes fundamental law when formally promulgated by the government it creates, after ratification by the citizens it governs. A statute is law when enacted by the representatives of the people as prescribed by the constitution; and the decisions of courts must find (1) the law under constitutional inhibitions, and (2) the limitations of due process and equal protection of the law over all governments and courts, older and higher than a constitution it interprets.

When a statute commands an act of loyalty to the state, e.g., a flag salute, against which conscience rebels as treason to God's command against worship of idols, a delicate issue arises between power and individual immunities under the federal constitution of such nature and so vital that the courts should seek to preserve both the authority and the right. For the conflict is between liberty of conscience in the most profound of religious scruples, and the authority invoked is the sovereignty of the nation. Thus is presented a sacred question that searches to the deeps of judicial wisdom a court's purpose to sustain the government's power to compel obedience to its authority without hurt to a lone conscience.

Some expressions in court opinions to the contrary, absolutes here are not opposed to absolutes. The rights and immunities protected against adverse action by the Federal Government under eight of the first ten and

four of the subsequent eleven amendments constitute the Bill of Rights of the Federal Constitution.

The freedoms of religion, of speech, of press, of assembly and of the specified guarantees, including due process under the Fifth Amendment; the right of petition guaranteed by the first amendment; the explicit rights protected against deprivation by the several States under the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments, of citizenship, of liberty and of property under due process and equal protection of law; and the additional privileges and immunities recognized by the courts as implicit in all citizenships of every free government—all are subject to the restrictions on Congress as declared in Section 9 of Article I of the Constitution and to those on the States as enumerated in Section 10 of the same Article; and generally, to such restraints as the Federal Government may prescribe for the good of the whole; and that it may decree for its own safety or preservation.

Moreover, every of these immunities, rights and privileges, however granted or decreed, is subject to *the inhibitions which separate right from wrong* and to the eternal aspirations for an ever higher law that limits every right enjoyed in human society, and resembles most the supreme absolute, if such there is, which in the words of John Adams derives from the "Great Legislator of the Universe." And even the government's first law of self-preservation is restricted to the command or prohibition of words or acts that in reality create a "grave and immediate danger" to the continuance of the government then dominant in the nation.

The difficulty, however, in reconciling the conflicts persists, notwithstanding our discernment of the composing principles. For the kind of *higher law* determinative of immunities and the limits of a nation's conception of its needs to survive involve questions of *both constitutional power and polity, not the achievement of temporary ends*. It is the function of the Congress to make the initial decision, since the law enacted must be within the grant of constitutional power; but it is the judgment of the Supreme Court as the final tribunal, to determine the dominant rights of both na-

tional and state citizenship, the paramount power of the government to survive and whether the prescribed or prohibited words or acts create in reality a clear and instant danger to the nation.

The review of the validity of legislation is not an undemocratic aspect of constitutional government; but is rather a necessary function of the judicial branch in performance of its supreme duty. In the thought of the Bishop of Bangor, the absolute interpreter of law "is truly the law-giver and not the person who first wrote or spoke" it. As mediator of powers between the state and Federal Governments, among the states and between the citizens of both the state and national governments, the courts must construe and apply the fundamental law to the end that effect shall be given to the will of a government to survive and that the aspirations of humanity for justice ultimately shall be realized under it.

Judiciary as Arbiter of Supreme Law:

JUSTICE HOLMES' ADMONITION that the "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts" and Chief Justice Stone's appeal that the Court's "own power of restraint" should impose a "check upon our (its) own exercise of power"—respectively overstress the legislative will and the final power of the judiciary in our democratic processes. Both the warning and the restraint in their emphasis tend to minimize the foundation facts: That (1) legislatures and courts are, with the executive, co-ordinate parts of a structure of Federal government with reciprocal checks; and (2) every branch approaches the problem of free government under fundamental limitations from the same political, economic and moral aspects of a representative democracy.

The courts, however, while functioning within the same orbit of power derived from the people, *perform the paramount duty of speaking last*, under a traditional judicial process older than the Constitution, with ultimate and definitive authority in applying its explicit limitations, as the supreme law of the land, expressly upon the States and by necessary implications upon its own and the executive and legislative powers.

There is in every branch of the Federal government an inherent weakness due to its inclination to exaggerate the importance of a particular process characteristic of its function; and herein lies possible reconciliation of conflicts between any two and among all the spheres of government. The administrative process of the executive branch too often breaches free economic enterprise and ignores the judicial process to the evils of autocracy, bureaucracy, and statism. The legislative branch in its acceptance of free and open "remedial channels of the democratic process" exposes minorities to the tyranny of a majority and nullifies, in the words of Justice Jackson, "the very purpose of a Bill of Rights * * * to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

But the courts in saving to every individual the fundamental rights impliedly granted through express restrictions upon the Federal Congress and the several states, and explicitly guaranteed by the First, Fifth and Fourteenth Amendments as construed in the spirit of the higher law, and in utter forgetfulness of the finality of their power—must have faith in both political and economic processes. And so should accept the act of legislation when constitutionally expressed, as the ultimate will of the people.

This respect of the judiciary for the processes of democracy and the aspirations for a higher law, however, should not assume the aspect of supine deference to, or of preference for, either the political or economic to the judicial process. The conception of energies and their manifestations and interactions in relations; the comprehension of all conditions, interests and tendencies of individuals and groups; and an understanding of philosophy's wonderings about and assumptions of principles and laws as they affect man and his interests in his relations to things and to his fellows—all should enrich and attend the judicial mind (schooled and expert in the rights and immunities under due process, equal protection and the limitations of constitutional law and the evolution of the law of nature) in its appraisal of human values, the purposes of government and the aspirations of justice everywhere and in all time.

Chapter Three

LIMITATIONS OF DUE PROCESS AND EQUAL PROTECTION OF LAW

Individual Freedom and Due Process Under Constitution:

HUMAN RIGHTS are the creations of the governments of political states. They have no existence without the social state, and change with its transformations of structure and with the evolution of and revolutions within governments. Hence, the error of assuming that the individual reserved forever to himself an absolute and uncontrollable liberty when he promulgated a fundamental law for his governance, wherein was prohibited the deprivation of his liberty "without due process of law."

Chief Justice Hughes makes clear the nature of liberty under due process—"Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

A right or liberty exists in a political or social state only when there "is a relation of a person or persons to some thing or person, and from its very nature it cannot arise or exist in advance of the persons and things related, and of which it expresses the relation." The sphere then of an individual's power over other persons or things is determined by the *instant* laws and customs which the state declares are applicable to the right or liberty under which the power is asserted. This is true whether the right or liberty claimed is regarded as a privilege extended by favor of the state

or is assumed a limitation imposed by the state on the natural liberty of the individual.

But it is suggested, there is no natural liberty except to the degree the individual has had physical, intellectual or moral power to maintain the right asserted; and personal liberty, in social organizations to control locomotion and physical movements of the individual body and the processes of mind, exists only when recognized by customary civil law. Civil liberty "is only freedom from restraint under conditions essential to the equal enjoyment of the same rights of others" and as defined, under constitutional limitations, by the legislature as positive law or found by the courts as the law of nature.

There are, however, differences in the processes of mind by which this customary positive law is found and enforced. The factual mind of the legislator reasons from observations or assumptions to the enactment of a statute intended forthwith to supply a need. The judicial mind is not so much concerned with the initial act as it is absorbed in the search for justice, and its definition and application to the factual situation discerned. Legislators ground their statutes on past facts for instant action. Judges in morals, reason and casuistry and from tradition evolve principles of justice, and construe and apply statutes for a present and also future use, *so long as the conditions endure.*

It is, moreover, one of the ironies of the fate of laws and of the nations they serve that the logic of positive law cannot overcome either economic forces, political trends or the human conscience. So, leaders of political thought and action sometimes become the victims of a good law, which public opinion does not sustain, or of a decision definitive of governmental action deemed by a court of last resort as either constitutional or void.

When the Federal Congress, ignoring the Compromise of 1850, attempted to extend and regulate slavery in the new territories and when the Supreme Court undertook to settle the basic question of delicate human labor relations, with its moral aspect and economic and political ramifica-

tions, by a judicial decree that emphasized the legal status and political effect of slavery and ignored the moral trend—they made inevitable the Civil War they sought to avert and rendered certain the final decrees of the conscience of mankind, which the sagacity of Lincoln so clearly discerned.

Civil Rights and Due Process Under Constitution and Amendments:

THE BODY OF THE CONSTITUTION neither defines nor guarantees liberty to any person, whether citizen of the United States or of any State. It is the Preamble alone that declares the "blessings of liberty" to be one of the individual needs for which the Constitution was ordained. This failure clearly to define spheres of Federal and state power and to safeguard the liberties of the people as citizens of either government, by explicit words, was supplied by amendment. The first ten Amendments were adopted immediately upon the promulgation of the Constitution to meet the demands for a Bill of Rights to protect the people against the feared Federal usurpation of power. They "operate on the national government only and were not intended to and did not limit the powers of the states in respect to their own people." The War Emergency Emancipation Proclamation made free men of negro slaves, wherever born; but a former slave "could not become a citizen of either a state or of the United States," since under the Constitution it was assumed "no man was a citizen of the United States except as he was a citizen of one of the States."

The Fourteenth Amendment was made part of the fundamental law *primarily* because of the will of the people to overcome the perpetual barrier to citizenship of the free negro. This amendment uses "citizen" in its political significance to designate an individual with rights under both the government of a state and of the United States; and it establishes the distinction between the citizenships of these respective governments, making that of the United States "paramount and dominant" instead of "derivative and dependent" upon state citizenship.

Since the Amendment is a prohibition on the states in whatever form or by any agency the state may act, it does not apply to wrongful acts by

individuals against negroes without authority of the state or in violation of its laws. And so the Court in the *Civil Rights* and *Corrigan* cases decided that racial restrictive covenants are valid as between private property owners. While not intended directly to affect the social relations or to regulate commingling of citizens or their manner of life, the Court, when first asked, and without dissent has just held, in the *Shelley* and *McGhee* cases, the Fourteenth Amendment is violated by state court enforcement of such covenants against either white or colored persons. Chief Justice Vinson states the discrimination condemned is of any nature against any color or race and that "equal protection * * * is not achieved through indiscriminate imposition of inequalities."

Moreover, the Court, in the companion *Hurd* case further rules the enforcement of restrictive racial covenants by the Federal courts of the District of Columbia is contrary to this Amendment and the Civil Rights Act of 1866; but it is silent as to the effect on the due process clause of the Fifth Amendment.

Thus, as a sequel of civil war, finally was evolved the declaration of equal protection under law of all in its most inclusive form: That no American court may function in aid of the enforcement of any act of any state or state agency or of any restrictive covenant between individuals discriminatory of civil rights because of race or color.

The Fourteenth Amendment has a *secondary* purpose as declared in the second sentence of the first clause, which consists of two prohibitions for the enforcement of its double purpose. The Fifth Amendment had placed a restraint on the powers of the three branches of the Federal government to make any process "due process of law"; but it did not similarly prohibit any state from depriving the citizen of his rights and privileges without "due process." The first part of the second sentence of the Fourteenth Amendment was intended to bridge this gap, as also "to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privilege of nation citizenship in other states."

The use of the second phrase of the clause, in the version and vision of some, was to free the tremendous development of industry and trade following the Civil War from the check which Chief Justice Taney's expansion of state police power, prior to the Civil War, had placed upon it. This subtle intendment may have been in the minds of only its more perspicacious sponsors, but its obvious purpose was "to nationalize all civil rights, to make the federal government supreme and to bring the private life of every citizen directly under the eye of Congress."

Whether intended or not, this sentence of the Amendment just discussed, originally conceived to protect free negroes in civil rights, in its double aspects of "privileges and immunities" and "due process of law," at sometime must be invoked by corporations, employing great capital in the development of national resources, against or in resisting the regulatory police power of the state. When this issue finally came before the Court, in a majority opinion by Justice Miller, sustaining a slaughter house monopoly granted by the state of Louisiana to a corporation, it was held: The "privileges and immunities" protected by the Amendment relate alone to Federal citizenship, and that the Fourteenth Amendment was not intended "to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states."

Source, Connotation and Purpose of Due Process Under Constitution and Higher Law:

IT WILL BE RECALLED that both the Fifth and Fourteenth Amendments prohibit the deprivation of "life, liberty and property" without "due process of law"; that the inhibitions against abridgement of the "privileges and immunities of citizens of the United States" and against denial of "the equal protection of the laws" as stated in the Fourteenth Amendment, are omitted from the Fifth Amendment; and that while the earlier cases suggested there might be a difference, it was finally determined the restraint imposed alike on the legislative, executive and judicial powers by the two Amendments is the same.

Much has been written concerning the sources and meanings of the

phrases "due process of law," "law of the land," "equal protection" and "privileges and immunities." They all give expression to the idea of justice and every of them is a restraint on the exercise of the absolute power of government; and, as a barrier against the arbitrary deprivation by a government of life or liberty or spoliation of property, is intended for individual defense and security.

Aristotle and Cicero use some of these expressions as standards of their conception of justice. The barons wrote the idea and their purpose of individual protection in the Great Charter and forced King John to sign it. In the following century, the phrase "due process" was adopted in two statutes under the reign of Edward III. Lord Coke, in the seventeenth century when the Commons of Parliament had become, with others, an integral part of the government of England, inserted "due process of law" in his draft of the Petition of Right.

The statutes, decisions and every formal paper affecting the freedoms of man in what is now Britain's Commonwealth of Nations, for seven hundred years and more, and the Declaration of American Independence and of every free people have proclaimed these words as fundamental of all law and have avowed the ideas they express to be the foundations on which rest the structure of all just governments. It is doubtful if the Federal Constitution and the constitutions of every American state could have been adopted without the promised or actual incorporation in them of a Bill of Rights.

Every of these foundations of justice puts some right and privilege of the individual beyond the right of a majority or power of any branch of government to destroy, and they fixed "due process" and "equal protection of law" as standards below which positive law could not fall in the control of human conduct and relations.

The sovereignty of the people is now the reality of representative government with delegated functions of their making. The eternal aspirations for the extirpation of tyranny and control of all authority have become embedded in the foundation law of free nations. None now may doubt the

need of checks on, and the balance of, all power in the administration of democratic government by both political and judicial due process.

It is this restraint on all powers of government, and particularly, on the aggressions and injustices of majorities in a representative republic, that is the supreme contribution of the American mind in the definition of substantive law and its administrative procedure under a constitution of the people and as found by their courts to be the law of nature. Thus is blended under a standard of due process the instant conception of what justice for all is under ordained limitations and a higher law in the changing conditions and relations of life.

It is only when our judges and legislators overstress the primary purpose of the Fourteenth Amendment to protect the negroes and sectional groups against the domination of some states—and so minimize or sidelong its vital declarations of a profound rule of natural law protecting minorities, irrespective of race, creed or color, against arbitrary majorities—that its sacrosanct guarantee of due process of law, in over-zeal for direct majority rule, is regarded as a "void."

When Justice Holmes so characterized these clauses of the amendments and Justice Frankfurter uttered his admonition that the "due process clauses ought to go," they did not overlook the source or ignore the purpose of the aspiration these phrases have served in the development of human justice, or forget their functions as mechanisms of the democratic process.

Although the basic philosophy of the former Justice never concealed its aversion to a higher moral law than power as right, "jurisdiction as power" and both as the essence of Austine's conception of the sanction of law, and notwithstanding many of Justice Holmes' positive avowals of legislative supremacy lead to the absolute supremacy of numbers; yet he must have had always in mind the fundamental concept—that the customs and traditions of a people and the precedents established by use in their law are standards determinative of instant justice.

For he said in his dissent of comprehensive grasp, incisive definition and pregnant differentiation:

"The word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

So also, it is a distortion of Justice Frankfurter's conception of due process to suggest, with natural law limitations ignored and all other constitutional restrictions inapplicable, that neither procedural nor substantive processes of law can protect the individual against the legislative absolutism of democratic despotism. Devoid of any pronounced antipathy to the province of natural law placing inherent limitations upon legislation, he but preferred democratic political methods to the judicial processes when he avowed: "*Except when the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained*" only "so long as the remedial channels of the democratic processes were open and unobstructed."

While this condition of open democratic channels, as pointed out by then Justice Stone, is "no more than the surrender of the constitutional protection of the liberty of small minorities to the popular will" and although the assumption may be gratuitous that the freedom "is ingrained in a people's habits"; yet the exception explicitly stated by Justice Frankfurter demonstrates his acceptance of the judicial process as essential in the determination of due process. In his dissent in the *Barnette* case, he says: "The attitude of judicial humility * * * is not an abnegation of the judicial function. It is a due observance of its limits." He summarizes his own in his idea of Justice Holmes' conception of judicial duty of the Court, in the words following: "Responsibility for legislation lies with legislatures * * * and this court's only and very narrow function is to determine whether

within the * * * authority vested in legislatures *they have exercised a judgment for which reasonable justification can be offered.*"

Due Process as Necessary and Basic Foundation of American Jurisprudence:

DUE PROCESS OF LAW is necessary to representative democracy because it is the essence of the judicial process and a basic standard of justice, as in analogy, the function of judicial review is an essential of the democratic process to nullify a statute violative of the Constitution. The mere definition of this standard and existence of the power of the courts to apply it, put checks on the absolutism of majorities; lessen the menace of the tyranny of a pure democracy; confirm the need of both political and judicial process as correctives of the maladjustments of government and of economic and social wrongs; and leave open the way for judges of different minds, experiences, life philosophies and concepts of justice to employ either the will of political power or the restraints of judicial process as the actual conditions of life may demand to do justice under law deemed sound for that day and society.

This is not the expediency of vacillatory opinion; nor the incorporating into law of the social theories of any thinker or the philosophy or prejudices of a judge. It is the sequel of the conviction that due process, like sovereignty of the people and freedom to think, is basic of every freedom and all justice. And when applied to human interests, it involves a statesmanship that transcends the strict meaning or narrow use of the statutory word and enunciates universal principles embedded in constitutions as well as evolved by the higher law of nature.

Moreover, due process in large concept embraces and is expressed as an enduring foundation of American jurisprudence in the rule of constitutional construction of Hamilton, Marshall, Matthews and Hughes—that our Constitution is for no day or age, but for an ever expanding future, self-perpetuating through interpretation and amendment. Hamilton gave expression to this postulate of an eternal fundamental law, like unto a cosmic force in continuous change:

"We are not to confine our views to the present * * * but to look forward to remote futurity; constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs."

Chief Justice Marshall, adopting the words of Hamilton, formulated the broad rule that due process and every power and limitation of the Constitution must be "adapted to the various crises of human affairs * * * * * leaving to the legislature * * * to adopt its own means of effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interest should require."

Justice Matthews says: "That the spirit * * * of liberty," which our institutions embodied, "was preserved and developed by a progressive growth and wise adaptation to new circumstances * * * and processes found fit to give, from time to time, new expressions and greater effect to modern ideas of self-government."

Chief Justice Hughes gives his conception of the meaning of the words of the Constitution, in answer to the suggestion of Justice Sutherland's adaptation of Chief Justice Taney's contention that the Constitution "must be considered now as it was understood at the time of its adoption":

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation."

Chapter Four

THE NATURE, SCOPE AND APPLICATIONS OF DUE PROCESS

Test, Function and Definition of Due Process:

AN OUTLINE in summary of some conclusions of the scope and applications of due process should supplement this conception of its origin, purpose and significance, as fundamental principle of universal application in human affairs, under limitations amplified in the preceding chapter.

Justice Matthews in his profoundly significant opinion in the *Hurtado* case, emphasizing the close and essential relationship of natural to constitutional law, gives the *test* of due process as:

“A process of law which is not otherwise forbidden must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country.”

In *Twining vs. New Jersey*, Justice Moody points out that:

“It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this Country and practiced by our ancestors, is an essential element of due process of law. * * * That (quoting Justice Matthews) ‘would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.’ ”

The *Okely* case states the *function* of due process, approved in subsequent decisions:

“As to the words from Magna Charta, incorporated into the Constitution * * * the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”

The Court has said it has "never attempted to define with precision the words 'due process under law' * * * It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." Justice Miller, in the *Davidson* case, regards as wisdom "the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning" upon which they may be founded.

Scope and Substantive or Procedural Application:

THE FIFTH AMENDMENT guarantees due process against federal and the Fourteenth Amendment against state action. The Bill of Rights, however, limits only federal power; and the court, in the *Twinning* case, has determined that the Fourteenth Amendment did not adopt the Bill of Rights as an entirety.

Justice Frankfurter in his concurring opinion in the recent *Adamson* case says: "After * * * unquestioned prestige for forty years, the *Twinning* case should not now be diluted * * * either in its judicial philosophy or in its particulars. As the surest way of keeping (it) intact, I would affirm this case on its authority." The principle of *stare decisis* is here applied because the opinion of Justice Moody is "one of the outstanding opinions * * * of the Court"; even though constitutional interpretation is not always bound by that rule, since it must seek the present concept of human justice under then existing conditions. And so rights under due process against a State are determined, not by the words of the first eight amendments, but by the Court's determination of what it concludes to be the foundation natural rights that are protected under the Fourteenth Amendment.

Certain privileges and immunities, in the words of Justice Cardozo in the *Palko* case, thus "have been brought within the Fourteenth Amendment by a process of "absorption"; because they have been" found to be implicit in the concept of ordered liberty," and neither "liberty nor justice could exist if they were sacrificed."

This liberty so protected against both Federal and state action includes that of *mind* as well as of action; e.g., freedom of thought and speech, "the matrix of nearly every other form of freedom," as a free press and of worship, and assembly and of the rights to life, liberty and property.

Since the purpose of due process is to protect minorities against the power of arbitrary government and because the Bill of Rights withdraws certain immunities and privileges from all political action, placing them beyond governmental action, *the test whether the Court shall now apply the protection should not be the substantive or procedural nature of the proposed change, but rather its direct or ultimate effect on individual rights.*

It is to amplify the obvious to point out the procedural safeguards of the Bill of Rights; for none now question, whatever the test, that the Constitution gives to every man his day in court, guards against local passions and immediate emotional action, provides the means and assures the opportunity of full hearing with aid of counsel and bars judges, juries and legislators from hasty discriminatory or biased conduct in the administration of justice under the imperatives of due process.

Moreover, the contention that this foundation guarantee is remedial only, overlooks the nature of the evolution of justice under law or regards alone its initial stage and so ignores the latest court utterances as to its proper applications. We first rebel against an anti-social act by trying to restore the disturbed status, then seek to prevent its repetition by defining the substance of a rule that condemns and remedies the wrong and protects the impinged right.

It is to mock justice to say: *That alone because a court or legislature employs proper procedure, it may take from the individual his life, liberty or property without defining the nature of the wrong charged or in any way considering the right asserted to be guaranteed under due process. Neither courts nor legislatures dare forget that both property and personal liberties are protected under due process, and that there can be no substantial right without procedure to enforce it.*

If in indifference to personal liberty or in zeal to protect property, due process be restricted alone to procedure, then the clearly defined personal rights of property and also of freedoms in the Bill of Rights will be unprotected against the states and immune because above all powers of government.

Justice Brown suggests in the *Downes* case that "there may be a distinction between certain natural * * * and artificial or remedial rights, which are peculiar to our own * * * jurisprudence." But this cautionary distinction follows the avowal that: "There are * * * principles of natural justice inherent in Anglo-Saxon character which need no expression in constitutions to give them effect." The distinction between substance and remedy is not of easy detection, since all procedural modifications, except insignificant changes, affect substantive rights. And so the Supreme Court in the *Blaidsell* case unanimously concluded that the extension of time within which to foreclose a mortgage did not impair substantive rights of the mortgagee under the contract clause of the Federal Constitution.

Right and remedy cannot be separated without peril to the loss of explicit constitutional guarantees; and substantive due process may not be ignored without inevitable political despotism—for thus the individual may be deprived of any freedom not otherwise protected specifically, if done in legal form.

There are present-day minds, as in the past, who would restrict due process to procedure; in Coke's concept, alone to jury trial and exemption from arbitrary arrest. So to limit its present application, however, is to forget the changes of the intervening centuries in representative government, in the powers and functions of courts and in the foundation law of nations; and particularly, it ignores the scope, purpose and historical background that induced the founders of American constitutional law to incorporate due process in the Fifth Amendment as a limitation on the Federal Government; and after the war of the states, to impose a similar restriction on the state governments for the safeguarding of the foundation civil rights of man.

Equal Protection and Immunity from Discrimination:

THE DRED SCOTT CASE ruled the descendants of slaves at the time of the adoption of the Federal Constitution were "considered as a subordinate * * * class of beings * * * subjugated by the dominant race, * * * and had no rights * * * but such as * * * government might choose to grant them." The Emancipation of the slaves, proclaimed as a measure of civil war, was followed by additions to the Constitution the most notable in the expansion of human freedom. For they "removed the race line from our governmental system," and secured to a "race recently emancipated * * * all of the civil rights that the superior race enjoy"—positive "exemption from unfriendly legislation against them distinctively as colored."

The Thirteenth Amendment strikes down slavery, prohibits the imposition of any badge or burden of servitude and decrees universal civil liberty. The Fourteenth Amendment added to the dignity of all citizens, born or naturalized, by providing "no state shall * * * abridge the privileges or immunities of citizens of the United States, nor * * * deprive any person of life, liberty or property without due process of law, nor deny to any person * * * equal protection of the laws." The participation of every citizen in the political control of his country is guaranteed by the Fifteenth Amendment—the "right * * * to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude."

No mind process has affected human development more than the belief of individual, family, tribal, racial, creedal or color superiority. This assumption stems from individual egoism or divine favor inculcated by religion; and it becomes the inspiration of a purpose to excel and aspiration to achieve which motivate and direct human progress. But this incentive illusion to the strivings of the *elect* has not always stimulated human action to higher levels.

The ambition of noble and base minds, pride of family, of station or of class, arrogance of racial superiority or ways of life, zealotry of creedal bigotry and the dominance of color, singly and collectively, are causes of

the conflicts of violence and ruthless struggles for power that have crimsoned the aspirations of humanity for freedom and justice.

The progress of humanity under the basic law of integration is demonstrated in the decrease to now only three groups of the innumerable families, tribes and races that successively have fought for dominance throughout the centuries. The Caucasoid, Mongoloid and Negroid races respectively of white, yellow and black color are the most numerous in the Europa-American, Asiatic and African sectors of world cultures. White Caucasians now control or direct Western cultures, the yellow races of Mongolian origin dominate those of the East and the black, brown and red peoples and the Semetic race have been minority groups of all dominant white or yellow human cultures.

The white race in all achievements of mind now dominates world civilization; the Anglo-American culture reflects the highest level and most general diffusion freedom has ever attained; and the Constitution, with its Amendments, of the United States expresses justice in its most sublimated form, since it knows no ruling class or caste, is blind to color, indifferent to race and saves to every citizen freedom under law and its equal protection to all.

At a time when this foundation of supreme American justice has been made a vital part of the United Nations Charter and our Court has refused to sanction a state's enforcement of restrictive racial covenants, it is not from choice reference must now be made to the cognate problems of discrimination and of segregation as aspects of color and racism that will not down. This rising tide of potentially irrepressible conflict now confronts the governments of the United States and the United Nations; and it must be solved with the realization of the effect our decision will have on world destiny.

The enactments of a state based on color or racial separation which involve the obligations of carriers operating wholly within the state or which do not relate to interstate commerce or to any Federal power delegated by the states, e.g., education, all raise the fundamental issue of their

violation of a congressional statute or of the Federal Constitution. The approach to the enforcement of this exemption from discrimination should carry in mind (a) the dual nature of our structure of government wherein every state, *on the foundation necessity of local control of diverse conditions*, has reserved all powers not expressly given to the Federal government, with the power of the latter supreme solely as to the grants made; and (b) that the rights guaranteed under the Federal constitution are enforceable as against their violation by the states *only when some person is denied a Federal right.*

Racial or Color Separation by Carriers:

THE FEDERAL GOVERNMENT in the Interstate Commerce Act, pursuant to its supreme power over interstate commerce, expressly prohibits a common carrier to subject "any particular person * * * to any * * * prejudice or disadvantage in any respect whatsoever." Prior to this statute, the Court, in the *Hall* case, has held a Louisiana statute which *prohibited* segregation, had imposed an undue burden on interstate commerce; and that *under* this statute the *Morgan* case has ruled a similar burden was imposed by a Virginia statute, which *required* the segregation of white and negro interstate passengers. Moreover, Chief Justice Hughes, in the *Mitchell* case, points out that the inquiry as to the nature of a discrimination against negro interstate passengers "*is not a question of segregation but * * * of equality of treatment.*"

The *Morgan* case assumes "that seating arrangements for the different races in interstate motor travel requires a *single uniform rule* to promote national travel." The Court ruled the Virginia statute imposed a burden on interstate commerce, since related statutes of other states make the "cumulative effects" of its "local regulation impractical. Eighteen states * * * prohibit racial separation on private carriers. Ten require separation." The regulation which compelled interstate passengers "to shift seats while moving in Virginia hampers freedom in selecting accommodations."

Justice Burton, in his suggestive dissent, refers to the significant facts that the Court serves as the "final arbiter of the conflicting demands of

state and national interests"; that in "weighing conflicting demands * * * the tested public policy of Virginia regularly enacted * * * should not be laid aside summarily"; and that in the words of Chief Justice Stone in the *Southern P. Company* case, "the state laws will not be invalidated without the support of relevant *factual material which will 'afford a sure basis' for an informed judgment.*" The dissent adds that since twenty states have not gone equally for or against separation, "the existing legislative diversity is evidence against the validity of the assumption by the Court."

The power to control commerce determines neither the wisdom nor necessity for the Federal regulation of accommodations for interstate passenger travel. Nor does it require Congress to devise a uniform system in disregard of the conditions and interests of different regions. A state cannot, in its application of the rule of diversity, cast an undue burden on commerce. Congress, however, in accordance with a foundation concept of the constitution, may exercise its power in the solution of problems arising out of commerce, by applying diversified treatment to different conditions deemed essential to the public welfare.

With reference to a Louisiana statute which required railroad companies operating *wholly within the state* to provide separate accommodations for white and colored races, Justice McKenna, in the *Chiles* case, says:

"In *Plessey v. Ferguson* * * * the statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution * * *. The * * * court * * * not only sustained the law, but justified as reasonable the distinction between the races on account of which the statute was passed and enforced."

The reasoning that sustained the power of a state legislature to recognize a racial distinction follows:

"If the test of reasonableness in legislation be * * * 'the established uses, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order' this must also be the test of the reasonableness of the regula-

tion of a carrier made for like purposes * * *. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable."

No call to lure the Court to explore new concepts of justice is needed to end separation when, in the wisdom of the changes of time, it ceases to be the true sentiment of communal association or under foundation law the just concept of equality without discrimination.

For the dissents of Justice Harlan in the *Plessey* and *Chiles* cases still admonish, in his profound words in the former case, that as yet the negro "does not object, nor perhaps would he object to separate coaches for his race, if his rights under the law were recognized."

The dire prophecy of Justice Harlan that the *Plessey* judgment "will, in time, prove to be quite as pernicious as the decision * * * in the Dred Scott case" was made on his time-proved erroneous assumption that the Court had abnegated its power to nullify state color or racial discrimination; in his lack of emphasis of the Court's duty to reconcile the state's power and the Federal right, to the maintenance of order, in securing the equality of such right; and possibly, in his fear that an addition to the Federal Constitution could not be avoided, if some states should evade or refuse to obey Federal mandates or should ignore the trend of equal enforcement of more definitive state codes of civil rights or should become indifferent to the extirpation of discriminatory practices.

An enlarging conception of civil rights—e.g., California's recent condemnation of separate schools for Mexican children established by a State agency without statutory authority—and a more sensitive protest to their denial have sustained the Court in its recent efforts to make clear its purpose to compel every state to provide for every of its citizens equal accommodations in interstate travel and equal opportunities for attending the State institutions for grade and higher education.

Racial or Color Separation in Education:

THE COURT in the *Gaines* case, in applying the "obligation of the state to

provide negroes with advantages of higher education * * * equal to * * * white students," in the words of Chief Justice Hughes, rules:

"The State has sought to fulfill that obligation by furnishing equal facilities in *separate schools*, a method the validity of which has been sustained by our decisions."

Two of the four precedents cited relate to segregation by carriers, one sustains separation in schools, and in the remaining *Cummin* case, the opinion by Justice Harlan, who wrote the vigorous dissent in the *Plessey* case, explicitly disavows the Court's consideration of separation, since: "No such issue was made in the pleadings."

The Court in the *Gong Lum* case so applied a Mississippi statute, which segregated for education the "children of the white and colored races," as to compel a Chinese citizen of the United States to attend a school exclusively for the children of the colored race. Chief Justice Taft, speaking for the Court, said:

"Were this a new question it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the State legislature to settle without intervention of the Federal Courts under the Federal Constitution."

The supporting cases, however, all follow the reasoning of Chief Justice Shaw in the Massachusetts *Roberts* case, which Justice Harlan, in the dissenting opinion in the *Plessey* case, regarded as:

"* * * Wholly inapplicable * * * because rendered prior to the adoption of the last amendments to the Constitution, when * * * public opinion, * * * was dominated by the institution of slavery; (and) * * * so far as the rights of blacks * * * race prejudice was practically the supreme law of the land. Those decisions cannot be guides in the era introduced by the amendments of the supreme law."

The conclusion would seem inescapable that the Court has yet to condemn a state statute which provides, without discrimination, adequate opportunities for all in grade and higher education, although such equal ad-

vantages require the separation of citizens of different races or color in accord with the constitution of a state and the usages and customs of its people. One is constrained in deference to precedent to acquiescence in the necessity of this *instant* solution; since the Court has been meticulous in differentiating between segregation and discrimination; and consistently also, has sustained state statutes which involve segregation in the regulation of commerce alone within the state and to the enforcement therein of its reserved police power for the general welfare and public order.

Moreover, the fundamental rule of interpretation is so to construe a State law "as to respect the proper balance between the states and the Federal government in law enforcement." Under this rule, the Court may sustain both the reserved powers of the State and the Federal rights asserted under the Thirteenth and Fourteenth Amendments, *so long as it adheres to its prior precedents that separation per se is not discriminatory in education or in intrastate commerce.*

The last order of the Court, however, rules the petition in the *Sipuel* case "did not present the issue whether a state might not satisfy the equal protection clauses * * * by establishing a separate law school for negroes." Here petitioner prayed for equal legal education as provided only in the state university for white citizens. The Oklahoma court refused to admit a negro applicant because she had not demanded "establishment of a separate school." The Federal Supreme Court ruled "that the equal protection clause permits no such defense" and ordered legal education be provided "in conformity with * * * the *Fourteenth* Amendment as soon as it does for applicants for any other group."

The state Supreme Court, however, in its mandate, ordered the state District Court to conform to *both* the Federal constitution and the constitution of Oklahoma, which requires "segregation of the races in the schools of the state." The state court's order was in the alternative, dependent upon the establishment of a separate school, and if so established, "to not enroll plaintiff * * * in the school of law of the University." The Court finally ruled that Oklahoma "did not depart from our mandate," but

not without the dissent of Justice Rutledge and the opinion of Justice Murphy that a hearing should determine whether the state court was *evasive*.

Constitutional and Natural Law Applications:

DUE PROCESS was seldom raised in America prior to the Civil War, since it was not until after that crisis the Federal government attempted to interfere with the individual or state control of his interests. Or more fundamentally, because specific restraints in the Bill of Rights and the limitations of natural law adequately, until then, had protected both individuals and states against invasions of Federal regulatory power.

The Court in the *Barron* case in 1833 decided that the Federal Bill of Rights restrained only the Federal Government; and that human rights under due process are to be regulated by the law of the states. Whatever may have been the philosophies of law and of life that have been applied by courts under foundation law, diligent search discloses no judicial utterance which denies due process is the essence of all positive law.

*A court decision has yet to be found that questions the law of nature and that ordained by constitutions and statutes are its complementary mechanisms; or that does not accept the comprehensive postulate in the *Hurtado* case: That "any legal proceedings enforced by public authority whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."*

Few courts have criticized construing a constitution in the knowledge of the concepts of natural justice as aides of interpretation. This may be because the purpose of law is to do justice, conditions and minds change, the aspiration for justice is alone constant and the conscience of humanity is its eternal monitor. But this does not mean there has been no diversity of opinion between the judges who perceive in certainty of interpretation the pragmatic expression of justice and those who seek to satisfy its ascending aspirations by always more precise adaptation to human relations.

This conflict of judicial opinion between the appeal of conscience, as the law of nature, and the dogma of certainty as the rule of *stare decisis*, finds expression not in certainty of Court decisions but in individual opinion that broods in dissent; e.g., the vigorous utterances of Justice Harlan in the *Hurtado* case and similar cases which are amplified in the earnest minority opinions, with exhaustive notes, by Justice Black in the *International Shoe* and the *Adamson* cases.

In his separate opinion in the *International Shoe* case, Justice Black, emphasizing the variant ideas and possible vacillations of natural justice, disapproves of Chief Justice Stone's expressions of its use in the opinion of the Court, because "tomorrow's judgment may * * * not conform to this Court's idea of natural justice."

He then refers to the fact, repeated as applicable to property as well as to personal freedom in the preceding paragraphs that:

"Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion."

Of course, "the application of this natural law concept * * * makes judges the supreme arbiters of the country's laws and practices"; but sharp dissent must be registered to the conclusion that "this result * * * alters the form of government our Constitution provides." The foundation of our constitutional government is that the judiciary necessarily becomes the final arbiter of the meaning of what is reasonable and just under a written constitution *as construed by the discerned principles of the law of nature*.

Justice Black makes clear the need of employing these standards when he points out that the Court "did use the terms 'fair play' and 'substantial justice' in explaining the philosophy underlying the holding that it could not be 'due process of law' to render a personal judgment * * * without notice."

And he further demonstrates the pragmatic function of a higher law when he adds that Justice Holmes, the apostle of the power of jurisdiction

and avowant of the absolutism of democracy to whom natural law was anathema, "speaking for the Court warned against judicial curtailment of this opportunity to be heard and referred to such curtailment as a denial of 'fair play,' which even the common law would have deemed 'contrary to natural justice.' And previous cases had indicated that the ancient rule against judgments without notice *had stemmed from 'natural justice' concepts.*"

The dissent of Justice Black in the *Adamson* case was concurred in by three of his associates. The following excerpt from that opinion states concisely the function of natural law as an aid in constitutional interpretation: "This decision re-asserts a constitutional theory spelled out in *Twining v. New Jersey* * * * that this court is endowed by the Constitution with boundless power under 'natural law' periodically to expand or contract constitutional standards to conform to the Court's conception, what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.' "

It would seem that unless natural law is invoked in constitutional interpretation formal amendments must be adopted to meet changing conditions in accord with Marshall's conception of an expanding Constitution.

Property Under Due Process:

The criteria of due process are private property, individual freedom and the general welfare as applied under democratic processes; and the test of its application is security to the state and the interests of its people as a group and as individuals. The political is the predominant approach to law; but the consideration of its economic aspects may not be ignored, if Harrington's equilibrium is the essential of just government. So all courts give heed to the consideration of both political and economic forces; and conclude that without this constitutional guaranty of due process, the right of private property cannot be said to exist under our laws.

All courts define property as an expression of individual liberty, but differentiate between the ownership of things and their value in exchange and in use to both the owner and to the public; which through the sov-

ereignty of the state, has paramount control over individuals and things by them made, exchanged and used. The majority opinion in the first *Slaughter House* case held that property meant the common law conception of things owned for exclusive use, and consequently that, the butchers of Louisiana had not been deprived of their property right to buy and to sell. The dissenting judges contended that "occupation is * * * property," that "property is everything which has an exchangable value. * * * Labor is property."

This narrow concept of property was extended by the Court in the *Munn* case wherein was emphasized the fundamental idea that regulation of the "use and employment" of property is not a "taking" without due process, and that the courts are without power to disturb the rates fixed by the Illinois legislature for the use of grain elevators.

This case is epochal; for it is the first in the history of law that detected the similitude in result of economic to sovereign power, and subjected the economic power of private property to limitations for the general welfare with the same effect as the grant of a government monopoly or delegation of a function of sovereignty.

The legal result is here in accord with the regulation of a public utility corporation which is clothed with delegated powers of sovereignty. The private property, moreover, is without any attribute of sovereignty, and its use may be regulated only on the factual basis of the economic power of property. The majority in the *Munn* case assumed the owner's use of his grain elevator, was in analogy to the grant of a government monopoly for such purpose, since in both cases the public was forced to use the exclusive service. The Court on this premise concluded the legislative power to regulate private property, making the arbitrary assumption that its owner had devoted it to a public use.

Eleven years after the *Munn* case, its too sweeping principles were revised; and in the necessities of changed economic conditions, the Court in the *Powell Oleomargrine* case accepted the exchange-value concept of the minority justices in the *Slaughter House* cases saying: "The privilege of

pursuing an ordinary calling * * * and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property." And in the *Blaidsdell* case, three years later, the regulation of expected earning power is concluded to be property. In Justice Blatchford's words:

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation"; but he concluded, the inquiry of reasonable rate "is eminently a question for judicial investigation, *requiring due process of law for its determination.*"

Whether the *Blaidsdell* decision over-ruled the *Munn* case, the latter precedent is now accepted as the source of that broad general principle of constitutional law that sustains the "curtailment of enjoyment of private property in the public interest" and the subordination of the rights of ownership "to the needs of other private owners whose pursuits are vital to the paramount interest of the community." The Court has adhered to this principle and applied it to the fixing of hours of workers in *Holden vs. Hardy*, because, as stated by Justice Brown, "*being competent to contract does not necessarily deprive the state of the power to interfere when the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself.*"

This reserved police power to transmute a private use or exchange value of property into a use charged with a public interest, and generally to legislate for the general welfare, may be designated as the supreme and dominant power under the constitution to which all explicit grants of power are subordinate; e.g., to tax, to spend, to coin money, to regulate commerce or of life, liberty and property and of free contract. The later cases of the Court wherein these delicate questions have been considered would seem to confirm the broad postulate: That the only limitation on legislative power in exercise of the police power or of delegated sovereignty is that the federal power shall not impinge the reserved powers of the states, for such invasion would imperil the vital structure of federal and state governmental spheres.

Public Use as Criterion:

THE MUNN CASE introduced in 1877 into the theory of law regulatory of economy, the concept of "clothed with a public use," as a criterion of "due process" of law. Despite either being over-ruled by the *Blaidsdell* case, or its modification to the "vanishing point of authority," the Supreme Court, with varying liberal or conservative view, had determined the issue of "due process" upon the test of "public interest." It had defined with reasonable certainty the limits of this test and explicitly had said, in the words of Chief Justice Taft, "the public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered."

While the Court since the economic collapse of 1929, in 1931 held the business of insurance, and in 1937 that of tobacco warehouses may be affected with a public interest; it had, however, in consonance with its shift since its modification of the *Munn* precedent, decided that neither employment agencies nor the selling of gasoline nor the manufacture and sale of ice was affected with a public interest.

It is a knowledge of these factual interpretations that makes the decision of Justice Roberts in the *Nebbia Milk* case so momentous in American constitutional law. Confusion as to the real significance of this decision in several fundamental aspects of constitutional change has followed in its wake. The too general assumption is that because the opinion did not emphasize the element of meeting an emergency by a temporary expedient and had neither stressed nor discussed to great degree in differentiation, its prior decisions holding the business of dealing in food commodities is not charged with a public interest, the Court had overruled the *Oklahoma Ice*, the *Minnesota Creamery*, the *Wolff Packing*, the *Tyson Ticket* and the *Blaidsdell* cases.

It is said the Court not only had reaffirmed in principle the *Munn* case, which previously it practically had overruled, but also had extended the underlying principle of that case and had upheld a statute fixing prices

to be charged by the milk producers which apparently was considered as not affected with a public interest. But this criticism ignores the fact that the opinion of the Court blandly makes the ingenuous assumption that the milk "industry is subject to regulation *in the public interest.*"

It is suggested the significance of the *Nebbia* case is its economic aspect. The challenged statute is sustained not because of an emergency or monopoly or utility; but in final analysis, because an assumed factual mal-adjustment of price in economy had resulted from "unrestricted competition." The Court did two unexpected things: It utterly disregarded its old precedents, condemnatory of price fixing, and accepted as the basis of its decision the previously modified *Munn* case.

This *Nebbia* decision is then significant in both sociological and juristic effects. It wrote into the fundamental law of "due process" a social philosophy that substitutes a government regulated economy for competitive individualism whenever, in the language of the opinion, "the economic mal-adjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other."

The Court has given an exalted statement of the function of law as liberator of man from the competitive wrongs of his own self-seekings. It is suggested, however, a grave danger lurks in over-stressing, as the sole test of whether a challenged social statute violates "due process," its "arbitrary, discriminatory, or * * * irrelevant" nature and in ignoring as a vital essential of such test the pivotal inquiry as to whether the business sought to be regulated is affected with a public interest.

It is suggested that while, neither the Fifth nor the Fourteenth Amendment prohibits "governmental regulation for the public welfare" and both "merely condition the exertion of the admitted power," and while "the guaranty of due process * * * demands only that the law shall not be unreasonable, arbitrary or capricious," yet a diligent search discloses no case wherein the Court has upheld any statute regulatory of price as not arbitrary or capricious which also was not "clothed with a public interest."

All statutes have been held violative of due process because arbitrary

in operation and effect, which attempted to regulate any business not affected with a public interest; and no statute regulatory of a business not affected with a public interest ever has been sustained alone because not arbitrary or capricious. In short, price-controlling statutes are arbitrary when the business is not affected with a public interest, and are sustained as not arbitrary if the business does affect injuriously the public; for the necessary conclusion of the arbitrary and capricious nature of the statutory regulation in individual transactions is obvious.

It is only when the individual transaction affects the public, the statute regulatory of prices may be arbitrary as determined by the court on facts by it found. It is then the effect on the public that alone warrants governmental control of the abuse of any property right; and the owner's right to fix the price at which he will relinquish his possession in trade is sacrosanct, and by the government should be protected so long as the public interest is not affected and the competitive system of individual enterprise in economy and the institution of private property remain the foundations of Western culture.

Labor Regulations:

THERE WOULD SEEM to be no essential difference in theory between the regulation of business by legislative enactments fixing the rates to be charged for the services rendered, and a government's imposing the conditions of labor relations; e.g., the hours of work for women or men in performing certain defined work or the minimum wages for women and children or the manner of payment or the prohibition of child labor in dangerous occupations.

An anomalous situation, however, developed in 1898, for seven years after the Court in the *Holden* case had denied the right of free contract to delimit the police power, it condemned in the *Lochner* case the New York statute which limited to ten hours continuous labor in bakeries. But in 1908 this *Lochner* case was overruled "*sub silentio*" when the Court sustained a statute which fixed a ten hour day for women working in laundries and factories; and in 1917, the *Lochner* case was again ignored when the court

held valid a general statute fixing a maximum ten hours per day for all Oregon mills and factories.

In this same year in several cases, the Court gave constitutional sanction to the compulsory compensation for injuries received in industry. The Court was enabled in these cases to ignore both the underlying principles of the *Lochner* case—of individual freedom of contract and of “the fellow-servant rule and other common-law rules affecting the employer’s liability for personal injuries to the employee”—because the compensation acts gave to the worker the right of election to accept its provisions or damages for negligence, and enacted the expedient of classifying hazardous and non-hazardous occupations.

It is clear, despite the wrong psychology and social thwarting economy of the *Lochner* case, there was in the first two decades of the twentieth century embodied in the law of the land by statutes and court decisions many changes bettering the conditions of labor, industry and trade. The ultimate result, so often overlooked but which may be accepted as a fundamental of economic compensation, was that the costs imposed on industry for improving work conditions and elevating the worker’s living were eventually absorbed by the public to the advantage of all; and this because of the intelligent self-interest of all.

Our Supreme Court did not for long deny that freedom of contract cannot be invoked by an individual against the effort of the state to enact minimum wage laws under its reserved police power. The vigorous dissenting opinion of Justice Stone in the *Tipaldo* case urged the direct and courageous overruling of the *Adkins* case because wrong in its understanding of the Constitution as construed by the Court’s prior decisions and in fundamental justice. In the following year, the *Parrish* case, in a profound opinion by Chief Justice Hughes, overruled the *Adkins* case and sustained the state of Washington’s minimum wage law; thus again recognizing the paramountcy of the general well-being to individual freedom of contract and so subordinating private property to its public use.

The fundamental issue in the regulation of industry and trade is but

another aspect of the controversy between the individual and the group. This issue is sometimes stated, by those who would foment strife between capital and labor, as the quarrel between the owners of property and those who must work to live. Many of economic mind see the basic conflict as between the possession of power growing out of the ownership of the tools of production and the control of the means of distribution and of the power of the people to control all human institutions, including property, and so promoting the general welfare through their own government.

Most students of both economy and the law, however, who are familiar with their foundations and therein seek solution in the search for justice, view the divisive problem as the conflict between the vested interests of individuals in property and the power of the group to control its use for the general well-being; or expressed in terse fundamentals under our Federal Constitution, between the instrumentalities of private work or property and the freedom of contract affecting either, and of the government to control that work, property and contract.

It is unfortunate the Courts so long delayed discerning the pragmatic truth: That there is no inevitable or necessary conflict between the public power over property and the private right to own it. Their interests are identical, since the group is composed of individual units with similar individual interests and consequent rights. Conflicts arise and must be composed by judicial understanding only when either the individual is too tenacious of his property rights or too assertive of freedom of contract; or when the group is over-reaching or confiscatorily unjust in the employment of its superior sovereignty to take and use private property or to impair individual contracts or to deny freedom in their making. The conflict over the minimum wages results from the contentions of both the employers and the workers of their right to contract as they desire and of the state's purpose to fix minimum rates or maximum hours, to the end of the general social well-being; thus bringing into judicial issue the due process and freedom of contract and commerce clauses of the Federal Constitution.

Chapter Five

DUE PROCESS, INTER-STATE COMMERCE AND FEDERAL POLICE POWER

Development of Federal Police Power Under Inter-State Commerce:

THE PRIMARY FUNCTION of government is to control individuals, things and relations; and to regulate is a means of control. The end of control through regulation is individual freedom and group welfare. The nature of the power to regulate commerce has been defined as "absolute," "plenary," and "complete in itself." The power conferred on the Federal Government, being explicitly granted, is free from clashing sovereignty, is not in conflict with powers reserved by the state, does not differ from that retained by the state over intrastate commerce, is not limited in its prohibitions to harmful or deleterious articles, and can be neither enlarged nor diminished by the exercise or non-user of state power—being subject only to limitations contained in the Federal Constitution.

The legislation enacted for the purpose of regulating inter-state commerce, as any other explicit grant of power, is not a subject of judicial inquiry either as to its expediency or wisdom or justice. Neither can its purpose be inquired into, nor the motives which influence sovereign authority. This power, although plenary, cannot be deemed arbitrary; but to execute the powers granted, the Congress has sole discretion regarding the choice of means as either convenient or useful or essential.

Every state reserves the power to subject to its laws things and the conduct and relations in economy of every of its citizens. Hence, all transactions affecting trade and industry wholly within a state may not be regulated by Congress as commerce; and the parties cannot by contract trans-

form intrastate into inter-state business. But, while the state can exclude a business or define the conditions under which it may be conducted in the state, it may not exclude any legal entity, individual or corporation, from doing an inter-state business.

The significant words of the commerce clause of the Constitution are "commerce," "regulate," "foreign nations" and "among the states." The conception of the nature of commerce has changed with the personnel of the Supreme Court and the economic and political conditions attending its definition; and, in its most comprehensive sense, it may be regarded as meaning the transportation, pursuant to sale or exchange, of things of value between citizens of different states or of any state and foreign nations, or, in short phrase, "intercourse for the purpose of trade."

The utilization of the commerce clause in the development of a paramount Federal police power over the economic, political and societal activities of the people is obviously because of the dominant characteristics of commerce and its correlated contribution to government. Intercourse means enlarged contacts with diffusion of other cultures, as trade carries knowledge of different customs and laws. Since the primary purpose of trade is profit and justice under law is the ultimate of government, commerce is (1) a dominant force in civilization, generative of freedoms and directive of the agencies of (2) democracy in economy and politics and (3) the creator of tolerance in thought and action.

The last years of the nineteenth and the beginning decades of the twentieth century are of greatest activity in machine production in the development of the nation's resources; and during this period of great expansion of trade, the commerce clause of the Constitution was utilized by the Court to sustain Federal and state legislation for the purpose of promoting safety in inter-state transportation and to protect the workers from the hazards of their employment and the travelling public from negligence. But the change of greatest political and economic significance, and a fundamental development in American polity, has resulted during this period from the use of this control over commerce to create a Federal police

power, paramount to the similar concurrent power of the states, originally conceived to be its proper custodian.

Except only as to the power to tax, to control mails, aliens and elections and to make treaties, the United States courts have constructed a Federal police power, as extensive and more drastic than that of any state, upon this power of the Federal Government to exclude living or material things or persons from inter-state commerce, because harmful to it.

Since commerce is intercourse in trade, the nature of the thing transported cannot harm inter-state commerce, but it might be injurious to individuals. When, then, in 1902 the Court assumed the constitutionality of the Federal Act making the inter-state shipment of infected cattle a crime, it for the first time gave legal expression to the doctrine: That, for the protection of the public and its welfare, the right to regulate includes the power to exclude.

It is anomalous and presages final basic change in fundamental law inherent in it, that the principle was first judicially applied to lottery tickets, harmless in themselves to either commerce or the public; but which Congress and the Courts excluded from inter-state commerce because by them deemed harmful to it—since they so affected the general welfare.

Thus, under the artifice of regulating commerce, lottery tickets were prohibited as subjects of inter-state commerce, even though the power to suppress lotteries was reserved to the states. And so the Court later sustained, among others, the Federal statutes affecting Pure Food and Drugs, False Branding, White Slave Traffic, Alcoholic Shipments in Original Packages, Motor Vehicle Thefts, Convict-made Goods, Pure Milk Transportation, Tobacco Standards and Tobacco Marketing, Fair Labor Standards and the Regulation of Various Phases of Agriculture. There is clearly discernible in the legislative debates and judicial opinions regarding these statutes a marked extension of Federal power in the creation of a full and dominant Federal police power, under a factual test and by standards of activity determinative of the nature of commerce and of the degree or character of things in relation to it.

With nothing explicit in the Constitution to authorize any exclusion, the Court *first* assumed, under the right to regulate, the power to exclude what was *harmful* to the public; and then, disregarding the nature or effect of the exclusion, it asserted the power to exclude *anything* or *person* from commerce—and thus coerced all engaged in inter-state commerce, irrespective of its *direct* or *indirect* effect on commerce or the public.

The second extension of the doctrine relates more to the thing affecting the commerce. There could be no objection to the principle when limited solely to harmful things in commerce or which directly affected the people to their hurt. But when the doctrine was extended to matters which indirectly, and finally to things that merely, affected either commerce or the public, then was revealed not only potential coercion, but a complete Federal police power, absolute over the social and economic conditions and the most delicate domestic relations of the states.

Reference should be made to some utterances of the Court in applying these extensions of Federal police power under the doctrine of exclusion. In the *Jones and Laughlin* case, the Labor Board had likened the steel corporation to "the heart of a self-contained * * * integrated body" which had transformed raw materials and distributed manufactured products to all of the states. The Court in concluding the corporation was affecting commerce, ignored in the large the distinction between direct and indirect effect; and Chief Justice Hughes broadens the power of Congress when he adverts to the power over commerce as plenary "no matter what the source of the dangers which threaten it" and, particularly, when he avows the purpose of the Court not "to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum."

The *Fainblatt* decision is such an enlargement of power under the commerce clause as to impel Justice McReynolds' dissenting opinion to state that the "reasoning offered to support it will inevitably intensify bewilderment." The court in that case held that the women's clothing industry "though conducted by * * * small units" embraced so vast a volume of

units that the industry could be regulated as interstate commerce; and this irrespective of whether the trade be "great or small" and although the finished goods were shipped to other states by the New York owner and not by the manufacturer.

A far reach of constitutional legislation in the delegation of power in the control of private business under the guise of regulating inter-state commerce is found in *United States vs. Rock Royal Co-operative*. This case followed the *Nebbia* case, basing the congressional power to regulate the sale of milk on the peculiar public nature attending that business. It should be noted that two of the justices concurred "except insofar as the opinion appears to imply that power of Congress to enact the marketing law depends upon the use and nature of milk. They do not believe * * * there is such a constitutional limitation on the power of Congress to regulate inter-state commerce." Two of the justices in dissent admitted the milk business is "not easy of wise execution"; but added that "so is the breeding the cows, authors of the commodity; also sowing and reaping the fodder which inspires them."

The Federal Agricultural Marketing Act was held to be a proper exercise of the commerce power notwithstanding the local activity of the commodity regulated when sales for intrastate are commingled with inter-state shipments. The Secretary of Agriculture was empowered to issue orders fixing prices for commodities equivalent to their purchasing power and although co-operative agencies were exempted from certain payments and given specified preferences and also the benefit of admitted monopolies.

The *Kirschbaum* case is exceptional, not only in its extension of Federal police power; but the more because it contains the frankest statement of the radical change the doctrine of new Federal power has worked in the law governing the economy of production, by making its every step and work contribution of any character a part of commerce under either Federal or state control. Justice Frankfurter's opinion contains as concise disposal of a constitutional issue to be found in the books, when it dismisses

as "without merit" the "suggestion that the Act * * * goes beyond * * * the commerce power"; and explicitly states that "the expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States." Then follows the generalization, the frank avowal of which but emphasizes our dissent, that "when the Federal Government takes over" "not only inter-state commerce as such but also activities intertwined with it, * * * (it) thereby radically readjusts the balance of state and national authority" and "those charged with the duty of legislating * * * do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

In the *Warren-Bradshaw* case, which extends the doctrine to oil drillers whose work stopped before oil was reached, the dissenting opinion asked whether the cook's work was "necessary" to the production of the oil. This question was answered in the negative in the *McLeod* case, because the cook was employed only to serve maintenance workers of an inter-state railroad. But in the *Walton* case, a night watchman in a factory which manufactured goods shipped to different states was held to be engaged in inter-state commerce, although he did not work on the products and the plant operated only in the day time.

These illustrative references to extensions of Federal power to the subordination of the state police power fittingly should close with Chief Justice Stone's statement in dissent, that the practical effect of the Court's decision in the *South-Eastern Underwriters* case is to take from the state and confer upon the Federal Government the regulation of fire insurance companies—which, under *Paul vs. Virginia*, since 1869, had been held not to be commerce, although other intangible things and contractual relations had been often so regarded by the Court.

But the dissenting opinion of the Chief Justice, concurred in by Justices Frankfurter and Jackson, was of so convincing and constructive criticism as to impel the Seventy-ninth Congress forthwith to give the

only remedial relief in its power. That Congress in complete reversal of the judicial action recognized the right of the States to apply their own public policy to the issuance of insurance contracts, reserving, however, its paramount jurisdiction in event of the failure or inadequacy of state regulation and subject to subsequent congressional action.

Due Process and Federal Police Power:

IT SHOULD NOT BE INFERRED that the creation of a supreme Federal police power with coincident extension of all Federal functions is now regarded as either error in tendency or function of government, or mistake of its purpose or goal. Although a Federal police power would seem not to have been intended by the Founders—since under such explicit general grant, the specific grants of power would then be redundant—and whatever may be our doubt or alarm as we contemplate the many legislative and judicial invasions of Federal power against the functions and rights of the states; yet the conviction abides that all who contemplate a growing nation and believe an expanding Constitution necessary to meet the needs of new and affirmative functions of government in the fast changing conditions of machine transition, economic emergency, social strain, political crises and war peril, must accept the legitimacy of such enlarged duties and approve the wisdom of our Supreme Court.

So the judiciary has established, through broad interpretation of its powers and in avoidance of constitutional amendments, governmental procedures of affirmative function, under the applicable guarantee of due process and equal protection of law, for safe-guarding the people against authority and monopoly, the deprivation of their freedom and for the conservation of their health and welfare.

For, however strictly applied and at times rigidly disregarded in seeming indifference to the basic purpose of due process, the Court nonetheless uniformly has held, since *Monongahela Navigation Company*, that the power to regulate commerce is subject to the limitations of due process. And, as the Federal became paramount to the State police power, both powers are subjected to the Federal guarantees of due process and equal protection as applied in *Currin vs. Wallace* almost a half century later.

Changes have been so fundamental in the meaning and application of the commerce clause within the interim of these years and, particularly, within the last five years, as to lead conservative minds to contemplate with misgivings the result, when ultimately is presented for decision the one issue most vital to the foundations of our constitutional structure: The saving to the states and to the people of the inalienable rights and powers by them reserved to control local activities and private business.

This outline review of recent decisions of the Court should demonstrate its tendency to permit the executive and legislative wills to determine the power to tax and to spend for the public welfare and, in the public interest, to regulate the production and distribution of things of trade and in commerce; and that in general, the congressional power to regulate commerce among the states is without explicit limitations as to the choice of means, purpose or wisdom.

Asservations of some to the contrary, the Court in its definition of commerce, however, has not given its sanction to the broad postulate that the legislative power is limited only by the congressional will; and particularly, that the statutory fiat determines finally the things that may enter into or be excluded from commerce or the manner in which commerce, or its restraint, may affect the people and their welfare. The Court still continues to adhere to the test of commerce as originally announced by Chief Justice Marshall, as supplemented and modified, but never abdicated, in any subsequent decision.

Substantial Effect as Ultimate Standard of Congressional Power Over Commerce:

WE REGARD AS REVOLUTIONARY, or as the abrupt ending of a period of legal justice, the over-ruling by the courts of a generally accepted fundamental legal principle, or its radical modification in necessary adaptation to changed conditions. Since the tragic era of reconstruction following the war of the states, every extension of Federal power through control of commerce has resulted from a congressional purpose to improve the conditions of the nation's workers, or in some way has involved the betterment

of economic relations or the general welfare. These humanitarian considerations and the pragmatic desire of legislators to solve the nation-wide problems of economy by and through Federal agencies, when similarity of conditions permitted, rather than a bias for radical change, may explain the relatively few instances, since the *Lottery* case, wherein the judiciary has deemed it necessary to sustain the reserve powers of the states against Federal invasions of their rights.

The *Darby Lumber* case accentuates the implications of basic change latent in the Court's latest utterances construing the commerce clause, since it ignores the covenant of reciprocal limitations, essential to our form of government, among the states, Federal government and the people. And giving paramountcy to the legislative branch, but making no reference to the accepted test of either immediacy or substantial effect, it explicitly extends the power of Congress "to those activities intrastate which so affect inter-state commerce * * * as to make regulation of them appropriate means to the attainment of a legitimate end."

However, this decision did not disappoint those who had hoped certainty, at some time, would be given by the court to its prior intimations that there must be a limitation to the power of Congress over commerce—else, with all other explicit checks of the constitution on the rule of numbers gone and the three co-ordinate branches of government out of balance, nothing will remain but the form of representative democracy as conceived by the Fathers. The Court, in a masterful analysis by then Justice Stone of its pronouncements, has given in this case, in concise summary, definitive expression to the power of Congress over inter-state commerce and of the function of the Court in passing on the validity of congressional regulations. Nor did the opinion relieve the Court of the duty, but it expressly assumed the power, to determine the foundation constitutional question involved: Whether the particular activity regulated or prohibited is within the reach of the Federal power.

Moreover, although the *Darby* case over-rules one (*Hammer Child Labor*) and limits the authority of another (*Carter Coal*) of the five cases

which sustain the reserve power of the states, it did not refer to or impliedly modify the law as applied in the three remaining cases of the group (*Butler, Schechter and Bailey*) and the later and now authoritative *Wickard* case—to which cases separate reference is now made because of their illustrative intimations and ultimate practical and just test of constitutional Federal police power under the limitations of due process.

The Court in determining the constitutionality of the several statutes involved in these cases, scrutinized the factual situation intended to be developed under each; and in every case, for the same purpose, applied in effect the same standard of test. *This uniformly accepted test consists of the two essentially concurrent inquiries: (a) Whether the Federal police power was exercisable in an arbitrary or unreasonable manner and (b) has the thing or activity to be controlled an intimate, direct and substantial economic relation to inter-state commerce.*

The *Bailey* and *Butler* cases involve the element of taxes. The Child Labor Tax Law in the former case was declared void, because the tax was in fact intended to prevent child labor without relation to inter-state commerce; and so was destructive alike of state rights and of the limitations on Congress. The opinion of the Court in the *Butler* case suggests the tax is "a mere incident" of regulation; but the Agricultural Adjustment Act was stricken down because of the unconstitutional application of the tax which was earmarked by the statute for an unconstitutional purpose. "It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised and the direction of their disbursement, are but parts of the plan * * * are but means to an unconstitutional end."

In the *Schechter* case the dressing and sale of poultry "was so remote as to go beyond the federal power—to find 'immediacy and directness' there was to find it almost everywhere." The Guffey Act, which attempted to regulate the mining of coal, was invalidated in the *Carter* case, because the Court said, the only "perceptible difference between that case and this is that in the *Schechter* case, the federal power was asserted with respect

to commodities which had come to rest after their inter-state transportation; while here, the case deals with commodities at rest before inter-state commerce was begun. That difference is without significance."

Justice Sutherland in the Court's opinion in the *Carter Coal* case has suggested as the criterion of immediacy in effect: "The manner in which the effect has been brought about." It is obvious this criterion must lead to confusion, since it ignores magnitude of either cause or effect suggested as controlling in the *Fainblatt* case, and also the recurrence of the evil intended to be remedied which is accepted as the test in several earlier cases.

This criticism of a criterion of the accepted test does not, however, affect its essential elements of intimate relation to and substantial economic effect on commerce—to which Justice Jackson, after an exhaustive and penetrating review of its earlier pronouncements, gave the sanction of the Court in the *Wickard* case in the concise statement that: Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress "if it exerts a *substantial economic effect* on inter-state commerce, and this irrespective of whether such effect is * * * 'direct' or 'indirect.'" Chief Justice Hughes in the *Santa Cruz Fruit* case, said: "'Direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined"; and in the *Shreveport Rate* cases, the Court found Federal intervention authorized because of "matters having such a *close and substantial* relation to inter-state traffic that the control is essential or appropriate * * * to the efficiency of the inter-state service * * * under which inter-state commerce may be conducted."

The nature of Federal power is one of the most vital concerns of representative government. The manner of its exercise in equal protection under due process of law exacts man's constant vigilance and his highest intelligence. This reference to the Court's precedent utterances should disclose some considerations and the reasoning that sustain the soundness of "*substantial economic effect*" to be the test of Federal police power as

finally evolved by the Judiciary and Congress without amendment of the Constitution.

While this standard lacks the mathematical precision of a formula, it performs a real and necessary function in the constitutional administration of the commerce clause—for it prevents its arbitrary use, protects the individual against deprivation of his freedoms and saves to the states powers by them never delegated; and it stops an interpretation of the commerce clause that takes from the states and the people rights by them reserved. And so restoring to the judiciary a supreme power never by it abdicated, it holds in check legislative absolutism; maintaining in balance Federal and state powers, it co-ordinates the branches of representative government; and bringing its exercise necessarily within the equal protection of law under limitations of due process, it demonstrates the vital function and purpose of this foundation principle of universal justice.

Chapter Six

DUE PROCESS AND REGULATION OF MONOPOLY

Federal Supremacy of Commerce Regulation:

THE WEAKNESS and, except for lack of power to levy taxes, the most practical defect of the Articles of Confederation was that Congress had no authority to regulate foreign or inter-state commerce. Economic conditions and considerations of private property dominated the convention that formulated the Federal Constitution; and the beginnings of the agitation for understanding among the states in all their relations had their inception in the disputes and antagonisms that attended trade among the citizens of different states. It was because of discriminatory state imposts and of these state quarrels over commerce and the control of navigable waters that Washington invited the Commissions from Maryland and Virginia to meet at Mount Vernon. The first commerce compact among the states drawn by him resulted from this meeting; and this led ultimately to the convention at Philadelphia after the Annapolis failure. The knowledge of these facts induced the great Chief Justice in *Brown vs. Maryland* to conclude: "It may be doubted, whether any of the evils proceeding from the feebleness of the Federal Government, contributed more to that great revolution * * * than the * * * general conviction, that commerce ought to be regulated by Congress." Hence followed naturally to the mold of Marshall's mind, the underlying postulate of national governmental powers—that under the commerce clause, it is as extensive "as the mischief and should comprehend * * * all commerce among the states."

We are prone to overlook the force of the political and economic conditions which called into being the Constitution and created a nation. The Federal government was struggling to live amidst the jealousies of states

strong in their rivalries, every of which had powerful factions of designing politicians whose self-interest sought the privileges and monopolies that came from their control of the state governments.

The service of the Supreme Court was momentous in aiding the development of the national resources, in cementing into union the divided states and forever ending the contention of monopoly—that the Federal government was helpless to interfere with the exclusive and sole grants of economic privilege over the means of transportation within the state. The decisions of the Court under Chief Justice Marshall could only have given to the nation its power and to individuals the opportunities of enterprise, through minds whose moral courage reflected the depth of understanding and the hatred of social privilege and of monopoly, which had been seized by those in temporary power of the state governments.

Gibbons vs. Ogden is the classic decision of the Court which clearly marks the limits of the respective spheres of Federal and state action in the exercise of governmental power, and avows the supremacy of the former in all delegated powers. It demonstrates the adaptability of the Constitution to economic conditions and formulates and applies its broad foundation principles in the understanding of a growing people and an expanding economy. Chief Justice Marshall, in support of his postulate that power over both international and inter-state commerce "is vested in Congress as absolutely as it would be in a single government," differentiates tersely between power of taxation and that over commerce as follows:

When a State and the Federal government exercise "the power of taxation neither is exercising the power of the other," but "when a State proceeds to regulate commerce * * * it is exercising the very power that is granted and is doing the very thing which Congress is authorized to do."

With the exception of two cases which permitted, under state statutes, the construction respectively of a dam and bridge over a navigable stream and an "original package" case, every decision of the Court in any way affecting commerce as defined by the Chief Justice followed, until

1851, the liberal rule of construction as by him enunciated in the *McCulloch* and *Gibbons* cases.

In *Cooley-Port Wardens* a far reaching modification of the Marshall doctrine was made; when it pointed out the test of differentiation between permissible state regulation of commerce and compulsory congressional action was dependent *more on the nature of the subject-matter regulated than on the power to regulate*. It was a divided court that introduced this expedient doctrine of "superior fitness and propriety," giving to the states such modicum of control over *foreign commerce and among the states* as in different sections its local needs required.

The Southern states might close their ports to free negroes, New York and some New England states could tax immigrants and other states restricted the liquor traffic; but the effort of the states was futile to retain power over commerce of an expanding economy which was knitting with rails of steel all states into a national fabric of inter-dependence—and this notwithstanding the Court's attempt in the *Peik* case to sustain the power on the ground of state competency in the absence of Federal control when the test of "superior fitness" could not be applied.

The decisions which sustain state statutes regulatory of common carriers, as in rates of transportation, were in the nature of convenient reasoning to protect the public against monopoly and in disregard of the historical purpose of the commerce clause, as well as opposed to irresistible economic forces. Within two years after the *Peik* case, *Hall vs. DeCuir* condemned a Louisiana statute, which attempted to regulate the inter-state carriage of passengers travelling in that state. The Court in this case makes its first reference to the "confusion, * * * great inconvenience and unnecessary hardships" of permitting one state to regulate its own carriers.

Justice Miller, in 1886, wrote the majority opinion in the *Wabash Railway* case, which stressed the modern necessity of "continuous transportation from one end of the country to the other." This decision repeats the historical fact that the Federal power over inter-state commerce is "among the most important of the subjects which prompted the formation

of the Constitution"; and dates the diminution of state control and the beginning of the dominance of congressional regulation, not only of the means of transportation but of its every aspect or thing that might affect the stream and flow of all business, and individual and corporate persons, engaged in inter-state commerce.

But the *Morgan* case, in accord with the *Hall* precedent, held invalid, as to inter-state commerce, a Virginia statute requiring segregation of white and negro passengers; and so was established the rule that state power over commerce "did not expand or contract because of the policy embedded in a particular regulation." The Court, however, in the *Bob-Lo* case has just held valid the Michigan Civil Rights Statute as to both inter-state and foreign commerce by narrow reasoning that amplified and reaffirmed the *Cooley-Port Wardens* criterion of state power, but differentiates the *Hall* and *Morgan* precedents.

The Court in its last utterance on the power of a state to regulate foreign commerce says: "Appellant hardly suggests that the power of Congress over foreign commerce excludes all regulation by the states. But it verges on that view in regarding *Hall v. DeCuir* * * * supplemented by *Morgan v. Virginia* * * * as flatly controlling this case * * *. No one of those decisions * * * involved so completely an insulated a segment of foreign or inter-state commerce. In none was the business affected merely an adjunct of a single locality * * *. And in none was a complete exclusion (of a negro) from passage made."

It should be noted the Court's conclusions are: "There is no national interest which overrides the interest of Michigan to forbid the * * * discrimination practiced here" and that the statutory requirement "to accept as passengers persons of the negro race" does not impose any undue burden on defendant in its business in foreign commerce.

Justices Douglas and Black in their concurring opinion point out the contrary precedents "held that diverse regulations of that character by the several states * * * would be an undue or unreasonable burden on inter-state commerce. But the question here is a simpler one." They regard as

"unthinkable" the Court would strike down "a state law which required all carriers—local and inter-state—to transport all persons regardless of their race or color." Justice Jackson in his dissent adverts to an infirmity in the Court's action and suggests the conceded fact of foreign commerce "alone should be enough to prevent a state from controlling what may or * * * must move in the stream of that commerce."

The power of the state against racial and creedal discrimination may then be asserted over both foreign and inter-state commerce when the Court concludes the statute "peculiarly and almost exclusively" affects "her people and institutions" and "no national interest or policy" is adversely effected.

This is true although admittedly the Court had travelled far from state's rights. For now states "cannot levy a tax on inter-state commerce in any form" or on transportation, or its receipts, or on the occupation or business engaged in it. But it must lead to inevitable confusion and retaliatory barriers for courts to assume the validity of every state regulatory statute until Congress speaks or the Court determines the validity of the barrier.

Congress having the undoubted power to determine the extent to which and manner in which the state may burden commerce by state legislation regulatory of their highways and instrumentalities of commerce, the issue of "barriers" between states and "burdens" to commerce calls for solution; which should come from congressional action amendatory of the Inter-state Commerce Statute and not by the enactment of new codes or the creation of new commissions.

Regulation of Monopoly Under Inter-state Commerce and Sherman Acts:
THE APPLICATION of new inventions by an aggressive individualism in the building of railroads following the Civil War led to the phenomenal growth of the basic metal, oil and all allied industries, the wool, cotton and all textile fabrics, and the raising of cattle, cereals and all foodstuffs. This phenomenal development assumed the form and was controlled and directed by vast corporate enterprises. These corporations within three decades,

had become so powerful in the political and economic life of the nation as to use the power of their capital and the monopoly of their special grants of privileges always to their own profit, too often in indifference to the due care and adequate compensation of the worker and sometimes with arrogance to the just demands of the public.

Regulation by the Federal government of the monopoly of common carriers and the privileges of individual enterprise became an absolute need, if the economic well-being of individuals and the general welfare were to be protected from the over-reaching of those in control of transportation or of industry or trade in which the public had an interest.

The Federal Inter-state Commerce Act of 1887 and the Sherman Anti-Trust Statute of 1890 were then the democratic answers of the people as a whole to the peril that confronted the individual as manufacturer, farmer, tradesman, worker in industry, or as consumer, when the courts finally determined the states were without effective control of either the means of production or distribution—and this because the commerce clause gave paramount dominion to the Federal government when the industry was inter-state and the due process clause when business was either inter or intrastate, or both. The first of these statutes, as amended in 1906, created a commission to consider and fix the freight and passenger rates of transportation to be charged by common carriers. The Sherman law defined as criminal all monopolistic conspiracies in restraint of trade; and prescribed penalties and punishment.

It is anomalous to the lay mind that sometimes courts construe legislation, remedial of economic or social wrongs, in seeming disregard of the mischief to be corrected or in refusal to apply the remedy. Yet a strict and often disappointing construction of such statutes is frequently necessary and sometimes not without economic advantage. Public good often results when a court for legal reasons is forced to limit full application of the new remedy, since reforms can be premature, often are not sustained by public opinion and strict construction may compel salutary amendments, and so prevent or allay economic dislocations of service and maladjustments in society.

The surprising decision of the Court in the first case that came to its attention after the commerce and anti-monopoly enactments and the equally unlooked for differentiation of it ten years later, but illustrate the fundamental fact of American democracy—that ultimately both congressional and judicial action reflect the dominant public opinion which emanates from the minds of the people, who finally rule.

In the *Knight* case, the admitted existence of the sugar monopoly was held to have no direct relation to commerce, Chief Justice Fuller saying: "Contracts * * * or conspiracies to control * * * manufacture, * * * production in all its forms * * * might * * * tend to restrain * * * trade, but the restraint would be an indirect result." For two years, the courts continued to sustain contractual restraints in trade and commerce under the contract clause of the Constitution, alone because they had construed to a contrary purpose the statutes designed to destroy monopolies.

The Sherman Law was first held violated when the Court condemned the agreements between competing railroads as to freight rates; and, five years later, in the *Addystone* case, the Court held: "Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade." But the full decade had to pass before the *Knight* case could be distinguished in such manner as to condemn the Beef Trust, as previously had been sustained the Sugar Trust.

This result could be attained only by a fundamental change in the definition of inter-state commerce, which the Court now said "is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit * * * in another, and * * * do so * * * the current thus existing is a *current of commerce* among the states, and the purchase of the cattle is a part * * * of such commerce."

This new practical conception of the commerce clause revealed its potentialities as the regulator of national power; for it disclosed not only what the state could not do, but, most important for its expansion, what Congress could do to assure the free flow of commerce, as well in the main cur-

rent of transportation of commodities among the states as in any of its tributaries lying wholly within any state. With the idea of commerce as a "current" came then the conclusion of the national power to free it from every clog that might impede the level of the flow at any point of the stream. And from this decision followed the Federal purpose to exercise congressional power to the end that monopoly shall be controlled and that national prosperity and development shall be co-ordinated with national economy and commerce.

The Court gave a "reasonable interpretation" to its sustaining the Sherman Law in the dissolutions of the *Standard Oil Company* and the *American Tobacco Company*. And within the next ten years Congress and the Court in enlarging the Federal power over commerce evolved two far reaching principles. The first rule emphasizes the *effect* of the proposed control, in contradistinction to the *source* of the injury; and the second, recognizes the control when inter-state and intra-state commerce are "*inextricably commingled*."

During this period was sustained every Federal statute enacted to implement the Inter-state Commerce Act or to extend the power of the Federal government over the instrumentalities of inter-state commerce or to enlarge for humanitarian purposes the scope of the commerce clause of the Constitution. One qualification, however, should be made to this statement; for the Tenth Section of the Erdman Act was declared void since "it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant *Adair*." This section made it a crime for a carrier engaged in inter-state commerce to discharge an employee solely because of union membership.

Within the last decade, the Court has evolved a "literal interpretation" the trend of which is to emphasize *size and probability of dominant control* as factors probative of monopoly. Until the Court in the recent *Aluminum* case modified or overruled its contrary precedents, none doubted its avowal in the *Steel Company* case that mere size is not an offense under the anti-monopoly laws; although, as stated in the *Swift Company* case,

such facts may not be ignored. When this epochal case was followed by the *Big Three Tobacco* case, which, in condemning their cooperative purchases as monopolistic, ruled there may be guilt under the Sherman Law without overt acts of collusion—the big business interests of the nation became alarmed at the probable nature of future judicial trends.

The Court did not allay their fear of its eventual purpose when, in its decision by Justice Douglas in the *Paramount Movie* case, the note to the *Griffith Movie* case was repeated—that “Size is itself an earmark of monopoly power”—and added, in extension of the *Swift* and *Aluminum* cases:

“Size carries with it an opportunity for abuse. And the fact that the power created by size was utilized *in the past to crush or prevent competition is potent evidence* that the requisite purpose or intent attends the presence of monopoly power.”

Moreover, the same Justice in the *Schine Movie* case makes clear that “the mere existence of the power to monopolize,” lawfully or unlawfully obtained, “together with the purpose or intent to do so, constitutes an evil at which the Act is aimed.” And in the *Paramount Movie* case, the Court concludes that “a vertically integrated enterprise, like other aggregations of business units * * * will constitute monopoly which, *though unexercised*, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so.”

It requires no mind trained in law to discern the revolutionary possibilities of these decisions. A conservative mind of foresight well might contemplate the potential use of these decisions by a collectivist dominated government to destroy, solely because of successful expansion or magnitude of dealings, the signal achievements of private enterprise and so regiment the economy of the nation under the power of a police or communistic state.

Regulation of Competition by Price-Fixing Statutes and Labor Monopolies: THE SHERMAN LAW condemns all monopolistic conspiracies in restraint of trade and contains no exception to its penalties. Until the recent decisions

following, under statute and decisional law, monopolies of three kinds, however, were not criminal.

(1) Under the *Nebbia* case prices may be fixed and destructive competition regulated by Federal statute when the offending business is charged with a public interest and the means or method of regulation are not arbitrary, even though discriminatory in favor of cooperative associations.

(2) *Patents are statutory limited monopolies in that under the General Electric* case the patentee may manufacture or use or license the right or sell the patented article at his fixed price; but he may not so exercise his monopoly by contract or combination as "to obstruct the free * * * flow * * * of inter-state commerce * * * even in a patented article after it is sold by" him or his licensee without "a violation of the Sherman Act." This exception was also stated by then Justice Stone in the *Ethyl Gasoline* case; and would seem to be the first decision in modification of the rule established in the *Standard Oil* case which held the Sherman Act not violated as the action "involves no agreement for uniform prices but leaves the defendants free to compete with each other in the matter of price."

However, the Court has decided in the recent *Socony Vacuum* case in the words of Justice Douglas, that "price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." The decision continues:

"The thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structure is engaged in an unlawful activity."

It must now be concluded as law that "the machinery employed by a combination for price-fixing is immaterial," that the "reasonable purpose" of the combination is as much without significance as its effect in raising, lowering or stabilizing prices or without effect whatever on the competitive market; and even though potential only and the cooperating parties are free to compete and actually did sell in a highly competitive market.

Under this decision there can be no cooperation in national economy among producers or traders though trade associations or institutes the purpose of whose acts, no matter how remote or reasonable, involves understandings as to the prices of the materials which they buy and not the prices of the products they sell. There cannot now be, with assurance of immunity, any co-operation with the Department of Justice or the Department of Commerce for either price reduction or stabilization of industry; and possibly it would be unlawful for the industry of the nation to cooperate with the government at a stabilized price for the production of things essential to its defense.

The Court in the *Movie Picture Copyright* cases condemned the price fixing combination in that industry in the words following:

"We recently held (*Gypsum* case) that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, * * * from fixing prices for the exhibition of films * * *. Certainly the rights of the *copyright owner* are no greater than those of the *patentee* * * * * * For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses."

(3) The anomalous situation in economy that both permits and punishes price fixing becomes the more singular because of the decision of the Court in the *Apex* case, which exempts from action for treble damages under the *Sherman Law* members of a labor union who admittedly combined by violence and intimidation of a sit-down strike to prevent an employer from shipping in inter-state commerce the products of his manufacturing plant.

The *Hutcheson* in extending the *Apex* case, refused damages to an employer for injuries growing out of a jurisdictional strike initiated by contending labor unions in inter-union disputes and in breach of their contracts; and this, however innocent of any unfairness or great the injury to his business or whatever the motive prompting the wrongful picketing, whether blackmail, racket or honest dispute. A divided Court there held

that the Sherman Law, on which the indictment rested, and the Clayton Act when read in conjunction with the declaration of the Norris-La-Guardia Act did not extend to the picketing of labor unions, "regardless of whether or not the defendants stand in the proximate relation of employer and employee."

This result was attained, says Justice Roberts in a dissent concurred in by the then Chief Justice; "By a process of construction never * * * heretofore indulged * * *, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws."

Regulation of Competition and Price Preferentials:

THE CLAYTON ACT and the supplemental Robinson-Patman amendatory statute consider "it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of" the former's "quantity purchasing power." The amendatory change of "great importance" is that Section 2 of the original act was "construed as permitting quantity discounts without regard to * * * seller's actual *savings* in cases attributable to quantity sales," but the amendment limited "the use of quantity price differentials to the * * * actual cost differences."

The Court rules in the *Morton Salt Company* case, by a "new interpretation of the Robinson-Patman act" that the issuing of a price differential among competitors casts on the seller the burden to justify the differential by showing cost savings; and that a "reasonable possibility" of harm to competition is all that need be shown to prove discrimination. The dissent in part of Justice Jackson, with whom Justice Frankfurter joins, thinks "the law * * * as always interpreted by this Court requires * * * a reasonable *probability* of that effect." And the opinion in dissent then adds that a phrase of inadvertence quoted in part by Justice Black in the opinion of the Court "is the only authority for making a thrice-rejected rule of interpretation a prevailing one. I know of no other instance in which this

Court has ever held that administrative orders applying drastic regulation of business practices may hang on so slender a thread of inference."

The dissent suggests the Court's decision obliterates "the difference between discounts which the act would foster and those it would condemn." It prohibits "quantity discount * * * without justification in savings affected by quantity sales to give a discriminatory advantage to large buyers." But it also recognizes that "our standard of living is due to the wide availability of low priced goods, made possible by mass production and quantity distribution * * *, and hence * * * whatever economies result from quantity transactions * * * should be passed down the line to the consumer."

Potential power over prices has always been regarded as a controlling test of monopoly. The Court, however, finally has said that *Congress may, but the individuals engaged in the industry may not, stabilize or correct the abuses of competition.* Congress may delegate to agencies by it created the power to fix the prices of any commodity; and thus the way has been made clear to regiment all industry, for the court explicitly has now denied its power to review the congressional declaration of the public need of regulation of a particular industry by fixing the prices of its commodities. But under the Sherman Law, it is criminal for any individuals to combine to stabilize industry through purchase of materials or the fixing of price however remote the control over the price.

There may be a sound principle of governance which warrants a government itself to do that which it condemns as criminal if done by its citizens. It is suggested, however, the principle is new to Western ethics; and if justification for the anomaly is that government acts for the good of all and the individuals for their own advantage in the fixing of the prices, then it may be urged that the court has sustained convictions of the individuals even though the selling price was not to be affected and the combination admittedly was advantageous to both the consuming public and to the industry.

Moreover, with propriety it may be asked whether it has been the ex-

perience of the last decades that the administrative agents, to whom have been delegated the delicate judicial duties that touch the sensitive nerves of economy, have in fact always functioned without bias or preconceived purpose and whether their decisions always have come from minds of integrity after free and impartial investigation of the facts. The power then given to administrative officials and the abnegation of the power to review the congressional regulation of industry, through price control, imposes on the courts the duty of strictest scrutiny in liberal review of the acts of the administrative agents in the exercise of their discretionary fixing of prices.

Regulation of Money and Due Process:

THE COMMERCE CLAUSE of the Constitution gives to the Federal government its supreme power over the people in all relations of economy, industry and trade among the states and a state and foreign nation. The power to tax and to spend confer to both Federal and state governments their respective direct control over the property of individuals and indirectly affect the welfare of all. The exchange of physical property in barter was early superseded by the utilization of a medium for the exchange of values. Thus, the fourth fundamental power of government "to coin money" and "to regulate the value thereof" from necessity was delegated by the states to the exclusive control of the Federal government.

Many things have served the purpose of money; but cattle from earliest times and the metals to the present have been in general use, with gold and silver and compositions of copper and lead as the sole survivors. Ever since the convenience of trade invested as money the promise of the government stamped on paper to redeem in gold or silver, the power to coin and regulate money has become the most delicate of governmental functions; and, in the certainty and degree of its effects on a nation's economic life, the most powerful instrumentality of government except war. Hence, the states imposed upon themselves the limitation upon their power to control by indirection the nature of money by express inhibition in the Federal Constitution that "no State shall coin money, emit bills of credits."

It is, however, the failure of our fundamental law either expressly to

authorize or to forbid the Federal government to issue paper money not convertible into "gold and silver coin," and yet "a tender in payment of debts," that has caused conflict of judicial opinion—*Knox vs. Lee* overruling the *Hepburn* decision, and the final extension in the *Juilliard* case was reached of the power to issue fiat money without limit.

The decisions reach high levels in their avowal of group welfare in preference to individual advantage, of the supremacy of the governmental will over individual contract and personal property; but some of the Federal legislation, concededly conceived in dishonesty was sustained by the Court notwithstanding over-reaching in operation. A joint resolution of Congress provided that "any obligation which purports to give * * * a right to require payment in gold (is) against public policy." This resolution took from the conservators of the nation's wealth billions of dollars, but the Court sustained the congressional power whether the contracts involved "private parties * * * or obligations of States and municipalities or of their political subdivisions." This is because, as stated by Chief Justice Hughes:

"Contract however expressed, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property but when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity."

It is clear the logic which sustains the fundamental conclusion of the *Norman* case can neither supply nor justify the power of the government to abrogate the gold clause of government bonds. And this for the reason assigned by the Court in the *Perry* case—that a sovereign cannot use the power "to coin money" in such way as to breach its good faith in performance of obligations created pursuant to its power to borrow "on the faith of the United States." The Court, however, by declaring value to mean "purchasing power," concluded that the holder of a governmental promise could not recover the difference between the former standard of fineness and weight and the new depreciated dollar, since the purchasing power was the same after as before the wrong.

So was invoked the Federal statute making it a crime for the owner of the bond to receive the gold the government promised to pay; and so in the opinion in dissent, spoliation was suggested in justification of repudiation and to the profit of the government.

Chapter Seven

POWER TO TAX AND DUE PROCESS

Taxation as Exchange of Equivalents:

TAXATION has been variously defined as different ideas inherent in its primary meaning are emphasized. All agree as to its sole function and primary purpose and as to the relations it involves between the government and the taxable and the government and the distributees of the funds. Its only function is the support of the government, and its primary purpose is the security of the state with attendant welfare of its citizens. The fundamental concept of a tax is of a proportionate charge involuntarily imposed by the state, and of a payment-contribution made by the taxable for the order and the security of the state and the protection of the person and property of the individual. The basic idea in justification of all taxation is the exchange of equivalents.

Hence, the power to tax should not be exercised without attendant benefit; which, however, must not be proportionate to the tax, but is always presumed to exist where the tax is general and for a public purpose. Since minds differ as to the existence of a necessary value, or of its measure, our highest Court has concluded that the "legislature must * * * determine all questions of state necessity, discretion or policy involved in ordering a tax and in apportioning it."

Because "perfect uniformity and perfect equality of taxation, in all aspects in which the human mind can view it, is a baseless dream," the payment of taxes has been characterized as a burden, a privilege and as a badge of honor; and taxation has been regarded as the imposition of a burden, the exaction of a contribution, the instrumentality of confiscation, the destroyer of enterprise and the price of freedom. Taxation may become

or produce any of these diverse effects; for it is the most delicate and powerful, the most destructive and constructive, the most tyrannical and liberal instrumentality invented by man for the performance of the most vital governmental function—the maintenance of human relations in equilibrium, the continuance of the government itself, the conservation of the state and the welfare of its citizens.

It is a truism that the consciousness of burden or privilege is personal to the taxable who pays, and depends upon two conditions: (1) His innate nature, i.e., whether fundamentally self or social regarding, and (2) the apportionment and purpose of the tax, i.e., the proportion of taxes imposed on him and how the government spends the fund collected.

No person can escape the sense of an unjust burden who pays a disproportionate imposition to a government which improvidently or corruptly squanders its levies or that uses public funds for other than public purposes. As when under guise of exercising a constitutional power, the government really enters into competition with private capital invested in individual enterprise, or distributes public funds in preferential subsidies to favored groups or, except in the extremity of an emergency, as a direct dole to the economic impairment, the intolerable humiliation and moral debasement of the recipients.

All, save the miserly or self-centered, esteem the privilege of contributing their just portion for the support of the government that maintains order and is the instrumentality of the economies of cooperation in caring for the public health and providing for the general welfare; e.g., the construction of sewage and water systems, the providing of recreation centers and medical attention and hospitalization and care for the needy, the unemployed and the aged. Every citizen of a representative democracy pays tribute only to his own prudence and worth as a man when he taxes himself for the defense of his nation, for he gives up part of his property and some of his freedom for a larger liberty and a more certain security. Equitable taxation is then for the individual his badge of honor and for the nation its agency of welfare and bulwark of security.

Just Taxation:

THE PROBLEM OF JUST TAXATION is too often confused with that of its equitable apportionment. The test of a just tax is its purpose. If its purpose is within the scope of taxation as a function of government, it cannot be unjust; for governments must function to continue their existence. The inquiries as to the benefits moving to the citizen and the taxpayer's ability to pay concern more the apportionment than the justification of the tax; for if the tax is imposed in performance of a governmental function, both ability to pay and benefit are presumed. The pivotal question involves then taxation as a function of government, for whatever is conceived as a need of the state can be satisfied and supplied only through this function of government.

The foundation need of civilization is the security of order; and to maintain order has been the primary necessity of the state, the justification for government and the warrant for the imposition of taxes for its support. So long then as security or the common defense of the state and the maintenance of order among its citizens were the negative and only functions of government taxation for revenue for these purposes was the only just tax.

But when it was conceived and finally determined that mankind was in state association to promote the general welfare, the functions of government became both affirmative and negative; and taxation was utilized for raising revenues for many needs of the state in addition to security and police protection. Ineluctably, it then must be concluded that any tax is just, the purpose of which is to promote the general welfare.

When the Supreme Court of the United States gave finality to the unrestrained power of the Congress and the Executive to raise and distribute public revenues for the general welfare, it brought to the fore in American economy and politics the universal ideologies that are in worldwide conflict. The democracy and individualism of the United States and of every representative republic of the West are today in struggle with the forces of an alien culture—Marxism in economy and dictatorship in government.

The basic political philosophy of our constitutional government is that of limitations on power to the end of protecting minorities not only of a numerous group or of a separate state, but of its lowliest citizen against the tyranny and self-interest of a group and against the usurpations of the people's representatives in temporary power. It is clear that no government can exist or order long endure unless minorities are shielded from group aggression, for a group tomorrow may suffer the reprisals of their minority victims of yesterday, and in final analysis the ultimate minority is the sanctity of individual equality.

The future then of representative democracy must be solved in its dual aspects—by the individual's choice of the mechanisms and his determination of the means for his own governance and participation in economy. It is the failure to apprehend the relation between and the interdependence of these phases of democracy that has led to diametrically opposed patterns of action and to radically different philosophies. Both the exponent of private property in his extreme espousal of individualism and the collectivist with his radical demand for confiscation of private wealth and income, avow the need of a strong central government.

The pendulum is now not only swinging towards centralization in political co-ordination with collectivistic action, but at this instant rests in a position of peril—and this because of the ease with which taxation, for the legal use of the public welfare, can be utilized for the revolutionary purpose of redistributing the wealth of the nation. An alert people, imbued with a sense of justice and endowed with an unalterable faith in individualism to sustain the foundations of our free economic and political life, must array the traditional concepts of American individual enterprise and political liberalism against Marx's revolutionary world purposes that would expose the savings of the people to confiscatory taxation under the guise of public welfare and subject them to the totalitarian will of a police state.

Taxation for General Welfare under Hamilton-Story Conception: The Federal Supreme Court in two epochal cases, with opinions that alike appeal to all students of the Constitution as sound and to their humanitarianism as just, has made logical the parlous conclusion that no change is now necessary in our fundamental law to make communism an actuality.

The Butler case is finally decisive of the Court's purpose to adopt the Hamilton-Story construction and to hold that the general welfare must be read as the ultimate purpose of the power to tax. The Davis case sustained the tax for security and old age and protection against unemployment, which admittedly are purposes not within any express or implied congressional power. It then must be concluded the power to tax and spend alone for the general welfare of the nation is within legislative and executive discretion, and is without constitutional restraint of any nature other than that states or people shall not be coerced in the use of reserved powers.

The existence of this awe provoking power has not come to the full consciousness of the American people and few realize its social significance not only to weaken, but to abolish private property. He is naively sanguine who hopes, or indeed is bold who dares assume, that this far reaching power with its ominous consequences to our free institutions will never be abused by part of the people, either aggressive minority or self-aggrandizing majority, in temporary control of the power. The sorrowful experience of mankind has implanted in the human mind the conviction that neither human leader nor conscience nor agency nor branch of government can be trusted not to abuse power.

Taxation and Wealth Redistribution:

THE SIXTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION does not provide any limitation on the amount that may be taken in taxation. There is no constitutional limit to the Federal debt. It is this omission from the Constitution of any check on the tax that may be levied against private property or any limitation of the public debt or on the spending that makes for communism and national bankruptcy.

It has then happened within the short period of a century and a half

after man's greatest achievement in his social and political development—that the fundamental law so has been changed by formal amendment and judicial construction, as now in effect to make the government, and not the individual, the possible master of his freedom and the keeper of his property. Thus, has passed from the individual to a legislative discretion, the control of the determinants of human initiative, enterprise and thrift.

The foundation institution of private property, which has contributed so abundantly to the development of man and his civilization, is without any right under the Constitution which the Congress and the President must respect; and the taxable whose surplus of material things alone makes it possible for government to exist and civilization to endure is exposed to the loss of inherent reserved rights, most vital to the development of his character as a citizen—the liberty to work, to save, to own, to strive and to achieve.

Let none assume a purpose here to suggest that private property or its incomes shall not be taxed for the general welfare, security in old age and indemnity against unemployment; and if there be any who desire such exemptions, let him read the powerful dissenting opinion of Justices White and Harlan in the *Pollock* case and be disabused.

It is here attempted only to direct attention to the arresting facts (a) That there is now no real constitutional limitation or effective restraint on the exercise of power and (b) that no violence or force or constitutional change is now necessary to modify or to destroy the institution of private property; and in fine (c) that the economy and industry of this nation are now within the control of the Federal government on all matters and things deemed by it for the public interest and within the scope of federal power.

No state can long endure which conceives its functions to be the taking from one individual his creative enterprise or so regimenting his efforts as to weaken, discourage or destroy the free use of his muscle or the full scope of his mind. No government of men can continue long to make such a fetish of democracy as to take from the worker all pride in the dignity of

his labor and its achievements, the profits of his superior mind in industry and give them to others less favorably endowed, under the pretenses of equalizing or redistributing the wealth of a nation.

Wisdom of Amending the Sixteenth Amendment:

THE CONSTITUTIONS OF THE STATES and all municipal charters contain restraints on the manner in which or extent to which private property may be taken for or devoted to a public use, as limitations on borrowing capacity, rate of tax and procedure of assessing benefits and awarding damages for the diversion from private to public use. So long as the federal legislators shall but ear-mark the funds raised by taxation or appropriated and spent for the public welfare, the Congress and the Courts under the Constitution may give protection to the institution of private property; but let either or both relax in alertness or purpose, and the structure of private property falls and with it Western civilization which it sustains.

He indeed is sanguine without reason who hopes a people again will protect their property by constitutional amendment after once they have abandoned the original safeguards or have become apathetic in the choosing of public officials and are indifferent to good, or servile to class-serving legislators and judges. Only a people aroused to an instant peril will now amend their constitution and eschewing vain hopes, will so assure the continuance of constitutional safeguards to property as a foundation of order and as a function of just government.

Those who believe in community of property and preach the need not only of class struggle but the dire necessity of civil war and of liquidating the workers of mind to accomplish their reforms are indeed inane and either blind or oblivious to the present political and economic structure under the Constitution as now construed. For what and all they need is ballots and not bullets, aggression and persuasion not violence, action and agitation not force in order to consummate their cherished ends of confiscation and to usher in their revolution of private property redistributed or forever destroyed; of human nature remade and for the time debased or forever degraded; of individual security alluringly assured, but at the

awful sacrifice to man of personal initiative, enterprise and character. In short, only the will and a sustaining public opinion of numbers alone are necessary to transform our economic system of capitalism into constitutional Marxism.

It may seem to the timorous as fraught with peril that the way to national communism should be cleared under our Constitution at a time when Marxism is generally taught in our colleges and schools, and, conjoined with realism in our national policy, is so insidiously inculcating a secularized philosophy of power devoid of ethical content or concept of justice. When international Marxism makes frontal attack on the private property of all peoples and imperils the economic peace of all and the existence and territorial integrity of some nations. When the exploitation of labor by capital, a foundation tenet of Marx, ceased only yesterday to be the statutory concept of labor relations as enacted by federal law and is now avowed by many leaders of thought in high positions and some in official place. But to those of stout mind, earnest purpose and resolute will the struggle for power, at this time, will be welcomed between the internationalism of police states and the free enterprise of free nations; between chance mechanism and the Christ religion, between the communism of Marx as avowd by the world wide Cominform just organized by Russia and the individualism and representative democracy of Harrington and of the Founders as written in our fundamental law.

People's Responsibility under Constitutional Concepts:

WE MAY APPROVE OR CONDEMN the changes in our fundamental law, but we cannot evade their basic nature or ignore their revolutionary significance. We are now confronted with the question that searches our minds for answer—whether the experiment of legislative rule, without constitutional checks is also without instant peril either to private property or to those traits of human nature that have made the American way of individual initiative and free enterprise and the ideal of world economy.

We now must forever carry with us the words of Chief Justice Waite and their profound meaning in the imposition of the greatest responsibility

that ever rested on individual choice. For let no American forget that "not the Courts" and not the Constitution, but his intelligence and self-interest as expressed by his vote "at the polls" is now the only "protection against abuses of legislation." His will is the sole restraint, under the Constitution, on the re-distribution of the individual wealth of the nation in exercise of the power to tax private property, or the spending of public money, or the regimentation of business, or the confiscation of capital charged with a public interest, or to stay the destruction of representative government.

A dictator will rise on the broken fragments of the government established by our Constitution only when are destroyed its foundation stones of a free society of independent individuals governed under ordained limitations of due process, which preserve the reserved rights of the states and of minorities, which protect property as the achievement of individual enterprise and which contribute to the dignity to work and the character of the worker, and alone can perpetuate the principles of our civilization.

Two hundred and fifty odd years ago, man forever ended the authority of hereditary privilege and power. He then determined to govern himself; and in the assertion of his individualism, he gave a new meaning to human liberty.

Secure in his new freedoms, man today wills that the power of all shall coerce to the general welfare the anti-social individual, whether employer or worker, and shall subdue the outlaw nation to world order, security and peace for longer periods. Thus, society in the attainment of its highest level now exacts from all peoples, as nations and as individuals, the duty of universal justice—the sublimest aspiration of humanitarians, the most sensitive form of all energy and its most powerful expression,—for justice alone can stay the chaos of atomic warfare.

Chapter Eight

JUSTICE AND POWER IN CHANGING FUNDAMENTAL LAW

Methods of Changing Fundamental Law:

IN THE COMPLEXITIES AND CONTRASTS of the present demands of human interests, there are those who overstress individuals, groups or branches of government as distinctive contenders for power. They would minimize the conflicts between the fundamental concepts of law and principles of governance that strive for recognition; and frequently, they have disregarded their application to social relations, and denied their significance as law. But they cannot overlook, and must accept as sacrosanct and paramount, the three great parchments of freedom in Western culture.

One of these charters preceded and the other followed (1) our Constitution; and all three repudiate the idea of either a group or a branch-of-government struggle for absolute power, but explicitly avow the limitation or control of power, through their foundation principles of right and justice, as the desideratum of democracy.

(2) The Great Charter is the first covenant in human history that decrees the end of the struggle of a king for power. It writes into human annals the just use of sovereign power under the rule of law.

(3) The United Nations Organization, in adoption of the Fourteen Points of President Wilson, expresses the highest level ever attained by representative government. It joins all world nations in eternal unity and presently plans the sharing by China of the East and by Russia of both the East and West, in the destined world leadership of Anglo-American-French parliamentary form of government. It declares the end of struggle

of aggressive nations for world power, espouses justice to all nations and proclaims the necessity for governments of law sustained by public opinion and ruled by men, who strive not for power but through conciliation have the will to be free.

Changes in positive law result by three different methods from as many general causes: (1) By amendment to a Constitution and change in (2) statutory or in (3) decisional law. A written or unwritten constitution may be amended (a) by formal proposal in compliance with its terms, (b) by acquiescence of the people and the government in a fundamental principle in modification of the constitution or (c) by change in personnel of the court.

The Federal Constitution provides two methods for its modification both as to the initiation and the ratification of the amendment. Congress may propose the change either by a vote of two-thirds of both Houses or must call a convention for that purpose on application of the legislatures of two-thirds of the states. Amendments so proposed become a part of the Constitution "when ratified by the legislatures of three-fourths of the several states or by conventions of three-fourths thereof, as one or the other mode of ratification may be proposed."

Another source of fundamental law creeps into its structure imperceptibly because of a people's general acquiescence in its wisdom. Thus, until the people willed otherwise, a succession for three consecutive terms to the Presidency was interdicted by an unwritten amendment; there has been general acquiescence equivalent to constitutional sanction that no presidential elector shall vote for other than the party nominee for that office; and President Theodore Roosevelt wrote an informal amendment of greatest economic import when he declared there are three parties to every dispute in modern economy or industry—capital, labor and the public.

The change of personnel of the judges is a third method of changing the fundamental law. It flows from the paradox that suggests formal amendments are futile because "judges who resort to a tortured construc-

tion of the Constitution may torture an amendment. You cannot amend a state of mind."

Change of Personnel as Interpretation or Amendment of Constitution:

THE PRESIDENT, with the consent of the Senate, names the judges. Lord Bryce refers to the failure of the Constitution "to determine the number of judges in the Supreme Court" as "a weak point, a joint in the court's armor through which a weapon might some day penetrate." It is this dual legislative and executive power to create the courts and to determine the number and personnel of the judges that in full understanding and proper exercise has made a free and independent judiciary; and figuratively, is the tendon which maintains the equilibrium of justice and sustains security and order as administered under our dual Federal and State governments. *But this vital organ is exposed to the possibility that executive dominance over a subservient Congress or a supine people may atrophy or cut it, with resultant collapse of equilibrium and the executive's becoming the dominant authority in government and its administration of justice.*

It is clear that with change in the personnel of the Supreme Court because of death, resignation or statute and with consequent constitutional modification of meaning, the last interpretation is *not in the nature of an amendment* to the Constitution but rather is declaratory of the Constitution. When, however, the Congress, at the request of the President, creates new Justices or in event of deaths or resignations, Justices are appointed for the declared purpose of sustaining as constitutional legislation similar to that which the Supreme Court heretofore in proper discharge of its functions had stricken down as unconstitutional—then the statutory increase in the number, or the appointment of partisan Justices committed to the determined purposive social economy of a majority, and consequent reversal of opinion or change in the meaning of the words of the Constitution is *not interpretation*, but in fact and effect is an amendment to the Constitution, because made for that avowed purpose.

No more insidious attack can be made on the concept of a government of laws nor greater disservice rendered to a constitutional government than

to suggest that its fundamental law purposively may be amended by changing the personnel of the Court. If minds of vacillation or of fixed economic conclusions or sociological purposes can ignore or pour their convictions into the explicit words of the Constitution, then the function of fundamental law ceases and changes to caprice or to the expression of arbitrary will or of a partisan majority committed to a predetermined end; and the Supreme Court becomes the instrumentality of its ultimate expression.

So a judiciary is degraded into a struggle for its control; and the power that makes such a court can unmake American democracy. If a President can persuade or coerce a Congress or a people to accept as truth his unwarranted assumption that the Supreme Court by arbitrary interpretation wrongfully has amended the Constitution, he thus may make use of a constitutional remedy aimed against judicial usurpation and a safety valve against violent revolution to destroy the ultimate sovereignty of the people. No mere congressional majority and executive directive were ever intended to emasculate an essential department of government; or to procure ratification of an executive social and economic plan either through the appointment of new judges, whose minds and convictions reflect the executive will or through the coercion of the minds and wills of sitting judges, whose only offense is to differ with an executive's conception of the meaning of the Constitution.

The conclusion that change of personnel of the Supreme Court is a desirable manner of modifying our fundamental law or that it is the only practical method to assure its amendment because of the assumed futility of trying to change an attitude of mind by legislative fiat, is based on a lack of faith in the sensitiveness of the mental processes to respond to the sobering influences of responsibility, which the elevation to heights of righteousness and exalted purpose to perform duty arouse within the judge in the discharge of judicial service.

It destroys the checks and balances of representative democracy that maintains order against the rule of restless and ruthless majorities, and transmutes governance by a free people under self-imposed limitations of

impersonal law into a struggle for the power of individuals or groups, who recognize no limitation in seeking personal satisfactions—and this in utter forgetfulness of the self-imposed restraints on their own acts that have made their conduct less of animal aggression and more of human rights.

It substitutes the decisions of an arbitrary and absolute will in instant action for balanced judgment and discretion in the determination of just human relations. This direct translation of popular will into instant power ultimately must destroy the judiciary as an independent branch of government. It will thwart the administration of law as law and as a means to the end of keeping in balance all societal and economic activities among individuals, and of restoring equilibrium in the relations between the federal and state governments and between either of such governments and the individual.

Changing Fundamental Law as Struggle for Power:

A MORE EFFICIENT METHOD can not be conceived to weaken free institutions and to impair the equality of all before the law than to represent the three equal coordinate branches of the Federal Government to be in constant and inevitable "struggle for power" and to asseverate that the Supreme Court has, "from the very nature of its functions, been deep in power politics from the opening of the Court." This casting of the Federal Judiciary and its court of highest appellate jurisdiction into the arena of party politics and of picturing it as the seeker of the supreme power in the state is sought to be sustained by the thesis: That the fundamental purposes of our Constitution as declared in its Preamble, the Founders determined and "*foresaw * * * would be*" achieved by and through a struggle for power, fomented by diversity of factional interests, between and among the governmental instrumentalities created by the co-ordinate branches and responsive or opposed to the popular will.

To state this assumption is to refute it; for there are struggles for supreme power only between or among those who, in antagonisms or controversies, can invoke the power of the purse or physical force in final arbitrament. No greater contrast of power in governance may be conceived

than that within the control of the executive and legislative branches and the utter impotence of the judiciary, which in truth is wholly dependent upon the two other branches for means to exist and for the enforcement of its decrees.

There have been contentions, clashes and struggles between the judiciary and other coordinate branches; but they always have been, and in the nature of the conflicts ever must be, in ultimate appeal to the moral opinion of mankind and of human justice against the force that would make arbitrary will the final arbiter of individual welfare. No Founder in the Constitutional Convention assumed the possibility of a struggle for power; and no Court, ever so avid for power, avowed a purpose to usurp or to seek supreme political domination.

The necessities of logic alone gave to the judiciary the function of squaring the law as enacted with the Constitution, of giving final authority to and discerning the meaning of the words of a written constitution. The idea of a struggle for power between the coordinate branches of government as a continuous incidence to the functioning of the Constitution seems inane, in the knowledge of the adoption and incorporation in it of Harrington's checks and balances in order to assure equilibrium in governance and the avoidance of either economic stresses or political strains.

There is a vast difference between the conflicts of ideologies and the clashing of philosophies, and a struggle between the coordinate branches seeking supremacy of power in governance. The former defines the historical facts in the development of constitutional law as an aspect of civilization. The latter may be characterized as the expedient in justification of the postulate; that change of personnel of the court, by executive and legislative power, is the one essential method of amending the Constitution.

The reason our government is so delicately balanced and the administration of justice so sensitive to change is that its structure is defined, its mechanisms are determined, the rights of the people are protected and the limitations on the functions of its branches are imposed by a written constitution whose words of general import must be given pragmatic meaning

by a human tribunal. The mechanisms of our government and its principles of constitutional interpretation are in a constant state of flux; and both reflect in their evolution not only the variant political and economic conditions, but also the minds, characters and environments of the judges, who give ultimate meaning to the Constitution as they apply it to changing conditions. They then are the real arbiters of government and of law under our Constitution, who in final appeal speak last in the judicial understanding of its vital words and in its application to new conditions.

The essentials of a representative democracy are that the people shall ordain a fundamental law which establishes a government with sovereignty vested in the popular will, exercised for the general welfare and which functions through instrumentalities created by its coordinate branches. There can be no democracy, with representation, without either the traditional assent of the people or, after referendum to them, their original adoption or subsequent amendment of a constitution.

Judicial Usurpation and Public Opinion:

THE UNWRITTEN CONSTITUTION OF ENGLAND may be amended by act of Parliament or by judicial interpretation of the House of Lords; but by either, only if and when sustained by public opinion. There is reserved always to the people of England the power of repeal by subsequent Parliament and to nullify constitutional interpretation of the House of Lords by the creation of new Lords. So in analogy, while amendments in several ways may be made to the written Constitution of the United States, every method makes the approval or ratification by the people a fundamental essential of constitutional change. Both the informal and formal constitutional amendments must be the seasoned judgment of the American states and of the people.

The people through their representatives in Congress and the President in theory have three checks on judicial usurpation. They may impeach and remove the offending judge or they may amend the constitution in accordance with its words or declare the amendment through interpretation made by additional judges created by Congress. This third method

of amendment, however, may be indulged *only after referendum to the people* for the purpose of sustaining legislation deemed by Congress as essential under the Constitution for the general welfare, but which the judges as instrumentalities of judicial action *arbitrarily* have struck down.

It is possible for a majority of the states and of the people not only to delay, but finally to prevent, formal amendment to the Constitution as construed by a Court which persists in nullifying the popular will. Judicial usurpation in the nature of a stubborn determination to thwart legislation deemed constitutional by the Executive, by a majority of the Congress and by a majority of the people on referendum, even if made a count in impeachment proceedings, is so difficult of proof as to make improbable either the conviction or the removal of the offending judges.

It would seem then that the only remedy under the constitution which a majority of the states and people have against the usurpations of judges by arbitrary and persistently wrongful interpretation, is the creation by the people through their representatives in Congress and the President of new judges with different attitudes of mind, other ideas of life relations and revised concepts of constitutional interpretation. It is this safety valve which the Fathers in wisdom provided against the alternative to violent revolution, and by which a growing and expanding Constitution continuously may be vitalized by adapting it to new conditions and relations, with identity of meaning and certainty of its application now as when ordained by the people.

In the knowledge of the nature of the attacks made on the Supreme Court because of its decisions in three leading cases involving property interests of magnitude—e.g., an imputed purpose to protect property in slaves, the charged appointment of new judges favorable to the legalizing of fiat money and the criticized reversal of opinion of a judge on reargument of the statute imposing income taxes—it cannot be said such always has been or will be the personnel of the judges and so impeccant their judicial acts as to preclude the fear that the judge's arbitrary will or unworthy personal motives or public considerations other than of justice may thwart

the popular will by striking down statutes which a dominant majority of the people believe to be constitutional.

Arbitrary Change of Court Personnel as Peril:

WHEN PRESIDENT FRANKLIN D. ROOSEVELT made his recommendation to reorganize the judicial branch by increasing the number of judges, its one commendation would seem to be his studied avoidance of any suggestion of struggle between the coordinate branches of government or usurpation of power by any one branch; or particularly, of any attempt on the part of the Courts to seek governmental supremacy. The President grounded his proposal on three propositions: (1) That the advanced age of some of the sitting judges burdens and delays the administration of justice; and (2) the assumption that because of the inclination of age to cling to the old, the elder judges purposively have declared by construction a Constitution contrary to the President's conception of its meaning—which conception (3) he is confident, is in exact coincidence with the Constitution as understood by the great mass of the people whose mandate he has received to create new judges that his conception of the Constitution may prevail.

It did not require the conclusive statement of Chief Justice Hughes to demonstrate the diligence and efficiency of the Supreme Court and to induce a discerning public to suspect the propriety of the imputation of justice delayed. The President's charge that the Supreme Court by arbitrary interpretation had usurped the people's prerogative and wrongfully had amended the Constitution *and his assumption that he, without referendum to the people, held their mandate to repeal its, to him, odious judicial usurpations are in truth the feared double-edged sword that may cut the Achilles tendon of American constitutional government.*

However divergent the respective understandings of the Court and the President as to Constitutional meanings and however many the citizens who may accept the President's assumptions, there are millions of Americans who will repudiate them, because of their confidence in the integrity of their Courts and in the loyalty of the judges to their oaths to maintain

the Constitution as their minds understand and their consciences apply its limitations to Federal and State legislation. *It is this admitted diversity of opinion that makes imperative a President's submission to the people the question of the truth of his factual assumption of judicial usurpation by arbitrary interpretation, if he would avoid the suspicion or escape the censure of making proposals in utter violation of the people's prerogative, by their act, to change their Constitution.*

Adequate Remedy under Constitution against Offending Judges:

AS AGAINST A STUBBORN COURT not responsive to public opinion and welfare, an independent judiciary as an essential instrumentality of representative democracy always can be procured in any emergency by methods prescribed in the Constitution. There are always sufficient liberals in every Congress forthwith to authorize the submission to the people of amendments remedial of what and by them and the President is conceived as erroneous Constitutional interpretation. Meanwhile Congressional action on any proposal to change the personnel of the Supreme Court should be stayed until after the next Congressional elections. If this is done, then will go to the people under constitutional referendum the issues vital to representative democracy and to the supremacy of the people under the Constitution.

One-third of the states have now permanent statutes which permit action immediately upon submission of the amendments and the required number to adopt can act on the amendments before such elections. Whether the amendments are adopted or not, if the elected representatives of the people so will, Congress and the President may then change the personnel of the Supreme Court without offending the letter of the Constitution, *whatever the violence to its spirit*. And this because after referendum, the statute is in accord with and gives effect to the will of the people; and under the American system of jurisprudence their mandate cannot be wrong either legally or morally or as the policy of the nation.

In final analysis then the issue involved in this controversy is factual; and as the fact is found, the statutory change in the personnel of the Court

may be enacted with or without breach of the fundamental law. But a President and a Congress, who do not have an explicit mandate from the people to increase the number of judges, are not warranted in basing an assumption of the people's implied mandate to do this revolutionary thing, on their vague and tenous promise to use every legal method to correct the alleged errors of the Supreme Court.

The change of personnel of the Federal Supreme Court by act of the Congress and the Executive is one of the most momentous issues that can touch the nation; for it involves not only the Constitutional structure of the state, but, in deeper signification, the usurpation by the Executive of the power which gives life, energy and purpose to the sovereign will of the people.

The conclusion is obvious: The acceptance by the Congress of a Presidential assumption, without referendum to the people, that the Supreme Court is biased in its judgments or refractory or inefficient in judicial service means the Constitution is no longer the fundamental law of the land; but that the changing rule of Congress with its passions and its creeds, its prejudices and its creeds, has become the supreme law.

It declares that while a subservient judiciary may survive, constitutional limitations are destroyed; and that the Congress and the President may invade the powers of the states, may impinge on the freedom of individual initiative and enterprise and may violate the basic principles of American individualism and of equality of the right to have rights under the law by modification or denial of the fundamentals of liberty, or property, of worship and of justice as once defined by the people in their Constitution.

Reverence, reason and the passion for justice impel the fervent hope that no President in denial of the people's sovereignty and by unwarranted charge and assumption contrary to fact, in any struggle for power ever may prevail on the Congress, by change of Court personnel, to impair the independence of the judiciary or to imperil its integrity. The people always must maintain their power to make the judicial branch under their Constitution define their government and determine the limitations of law and economy under which they live.

XI
JUSTICE AND
DETERMINANTS OF
CIVILIZATION



Chapter One

JUSTICE AND POWER AS DETERMINANTS OF HUMAN CONFLICTS

Reason and Government Reconcile Conflicts:

THE DOGMAS OF CHANCE, change and of tooth and claw survival eliminate purpose and choice as manifestations of mind and moral power. The dominance of fate, however, is now passing to the assumption of an inner urge or a purposive inter-action of energies in the development of all structures, organisms and relations. This solution of vital and inorganic continuity is more than the resolving of a compound into its elements; for in addition to analysis, it seeks the cementing cause of the new synthesis. It observes a force, thing or status, sees its fission into opposed forces, which then coalesce or colligate and finally emerge from the conflicting potentialities of the lower to a higher level of development.

This process of emergent evolution suggests, in analogy, that individualism and statism—the purpose to rule and willingness to be ruled—are the foundation antithetical principles of man's governance, of his political activities and of his social structures. Here also, is disclosed the principle of reconciliation between liberty and authority, between the will of the constituent and the general purpose of the group. The individual feels a desire, his purpose is to enjoy the want imaged and he wills its satisfaction in conflict with the interests of other persons. Thus, arise individual self-assertions, baulked group reflexes and race conflicts, with the result that authority, like the meson of the atom, must synthesize the common will expressive of the general welfare and in satisfaction of all individual wants and interests.

This is a seemingly impossible task; and yet the eternal problem of governance is the conciliation of the conflicting wills of men, the graspings of nations and the interests of both individuals and groups, which is in ever ending process of definition and solution through the application of principles of justice. These ideas of justice are conceived in understanding, expressed by public opinion, inculcated by education, accepted by governments, made real by the fear of authority and enforced by the power of sanctions; but, in opposition, rebellion or war, are finally settled by the arbitrament of arms.

Governments are the creations and instrumentalities of public opinion; man is controlled by the constant fear of offending the group; and he cannot ignore his experiences as embodied and expressed in the group customs which helped to mold his life. Thus arises and is justified, the confidence of man that government is necessary for security and welfare; that its rules of conduct and of group and individual inter-relations are righteous and must be obeyed; that such obedience can be enforced only by the sanctions defined by the state; and that with the government, as the mechanism of the state, reposes the power to enforce the sanctions prescribed, the statutes enacted and the law as found, adjudged and construed by the courts.

The laws of society in broad generalization, then, are for order, freedom and economy; in function, are both negative and affirmative; and in result, should maintain the balance of society. Laws always have been regulatory of conduct through prohibitions, and only in recent years are they becoming more administrative, because more in contractual relations with life economy. This administrative aspect is to many the alarming change in the development of modern law; not so much because new rights have been created, but that old rights and new duties are enforced through bureaus or tribunals created for the performance of highly specialized administrative functions, which in many essentials are of a judicial nature.

The underlying conflict of individualism and statism, that now confronts and confounds man, involves the alternatives of negative regulatory laws for necessary order and the affirmative administrative policies for

assumed welfare. The solution lies not in the acceptance of one to the exclusion of the other, but rather in the modification of both to the assurance of social balance through compromise and conciliation.

The contribution of religion to political and societal development, and the inclusion therein of the law of nature as the final rule of justice must be supplemented by reference to both the disservice and contribution of war to justice, by fair discussion of the ideas and epochal contribution of the rationalists, if a full understanding is sought of the dominance of mind in the evolution of human government; and particularly, as a prelude to the acceptance of representative democracy as the essential of all human freedoms.

Mind, as every other manifestation of energy, seeks to overcome resistances; and the force and form of its final expression reflect the nature of both the energy itself and of the obstacles conquered or repressions mastered. Hence, changes in human thought and institutions are sometimes of evolutionary or reformatory or revolutionary nature and are either peaceful or violent, transitory or permanent, superficial or of the very bases on which the structure of civilization rests.

The rationalist conceives certain periods in the intellectual development of mankind, from which emerge fundamental concepts that have become the foundations of human society, as confirmatory of one of the harshest generalizations of paradoxical thought—that war times of carnage and destruction are also periods of greatest intellectual ferment and achievement in science, religion and government.

Four such epochal periods recur as the idea of representative government is reviewed: Disservice and contribution (1) of ancient ideologies and wars, (2) of the medieval church-state and religious wars, (3) of the European and American revolutions and (4) the modern global wars for justice under law and for humanitarianism.

Disservice and Contribution of Ancient Ideologies and Wars:

PLATO IS ACCLAIMED THE MASTER of philosophical writing: and yet no mind unaffected by the glamour of centuries of praise for the charm of his

detached approach to ideas can close his books without the conviction that he surpasses all ancient thinkers in the number of his foundation political concepts which later minds of enlightenment have regarded as not adaptable to human affairs or to modern conditions. His idea of the attainment of perfection in government, and thereafter its persistence as a status that knows no change, is not of this world life; but for the pure philosophers of a celestial realm.

The purpose of his perfection is neither happiness nor comfort nor contentment of all the peoples of a society; but the end of all body training and mind discipline is the development of courage in battle of the individual citizen, who is a slave to the national will. And so, war on earth is his conception of an everlasting status for the attainment and permanence of human perfection.

Plato's idealism implies a perfect mind, but his paradoxical suggestion of indifference as the means of personal development confirms the absence of any conception of the purposive evolution of progressively higher levels; and must make certain acquiescence in a status, however remote from perfection. It is certainly not clear how, without change, the station of valor or of any higher trait of character can be attained by man born to animal frailties; since unaided by an alert dynamic mind, he must continue his bovine status without purpose, progress, perfection or even idea of change.

Cosmic evolution or universal change by the emergence of new manifestations of energy from an old integration is the creative power that controls the forces of atoms and cells and the motions of the earth and the universes. It is our assumption that as energies form atoms and cells, so mind has directed the subconscious desires and conscious aspirations that man experiences the changes of successive goals achieved; now at higher, then at lower levels, but always ultimately ascending towards an illusive though never attained ideal of justice.

This cosmic energy principle first was conceived in the structure of the atom by Democritus at a time when the first great change in the ideologies of Western cultures was taking place. Plato was a traitor to Athenian

democracy; and his philosophy of the police state, realized in the modern totalitarian patterns of Hegel, Hitler and Lenin, gave comfort to the enemy after Spartan autocracy had won the Peloponnesian War and so dominated Athens and the whole of Greece and its islands. His paradoxes had lured the Greek mind to the mists of metaphysics, from which man has yet to escape.

But it is the crude concepts of Democritus' changing atomic forces and of his espousal of the cause of human freedom that finally have mastered and now dominate man's scientific and political thought as affecting economy or morals. Plato ignored the basic principles of creative energy in the structure of the elements of our earth, its life and its universes; and he has become the accepted source of the philosophy that supports the modern police state as the essential of community of property—the foundation ethic of his economic society.

It was, moreover, Aristotle who detected the significance of Democritus' contribution. During the century of Alexander's plunderings and slaughterings in the world's first conquest, the highest level of Grecian culture flowered in Aristotle's idea of the nature of man and his governance, that for eighteen centuries dominated human thought.

Polybius contrasts the contentions and fall of the Greek states with the stability and harmony of Rome's expansion of empire during the Carthaginian wars and attributes it to the balanced harmony of the Roman state. He is the first thinker to point out that: (a) The state is a mechanical structure which holds in balance, (b) through a system of checks and balances, (c) the conflicting forces and power of three groups—absolute consuls, aristocratic senate and democratic tribunes.

Cicero within the century following Polybius, amidst the tumults of civil wars, praises in its decay the eternal virtues of the Commonwealth as the best of human governments—because, as he perceived, the law of nature was a part of its every function under rules of Roman law, which gave a practical justice to the Stoic principles of liberty and equality as conceived by the individual conscience.

Thus, in times of corruption, crime and proscription and under conditions of repression, inequality, slavery and civil war, the law of nature was in vain invoked by Cicero to save the greatest of ancient representative republics from becoming the empire of a tyrant's will. But its foundation purpose survived as the principles of Roman law, through church and secular authority; and finally, became the conscience of mankind in mollifying the barbarisms of war, alleviating the conditions of family life and social relations and in enlarging the field of the individual in choosing his rulers.

Disservice and Contribution of Medieval Church-State:

THE RELIGIOUS LIFE ALIKE OF THE HEBREW, whose Jehovah was the one creator and ruler of all, and of the Christian and Mohammedan, with similar deifications of a human life, gave to mankind monotheistic conceptions of an anthropomorphic God, whose son or vicegerent was the Savior of mankind. It seems incredible that for a thousand years human thought should be in almost complete eclipse and that fourteen hundred consecutive years should be barren of permanent scientific, political or societal achievement. And yet during the period from Ptolemy, in the second, to Copernicus in the sixteenth century, no great thinker with either new concept or idea or revival of old contributed to the stream of political or economic thought or changed the course of either.

The culture of the Greeks, which in pure thought had reached heights never surpassed and in science had uncovered nature and guessed her secrets, and the Roman concept of justice under impersonal law during this period were submerged in two homocentric dogmas which authority inculcated : (a) The one dogma was religious, and made the eternal salvation of man the center of divine concern; (b) the other was scientific, and made the sun and planets revolve around man and his earth.

The cause of this stagnation of the growth of the human mind may be found in the opposite natures of the dominant determinants that influenced man during this period. These forces were the ignorance and superstition of the great mass of subject people who were just emerging

from tribal life and the religious authority and secular power of the Church which governed and molded life. All Western learning was under the dark shadows of barbarism that covered all Europe except its north Mediterranean fringe and the scattered spots of colleges and monasteries, and of a symbolic and dogmatic religion, which ruled mankind through a Church of iron power founded on the political structure of the Roman autocratic state and discipline of its legions; and it was dominated by the authority of the pagan Greek philosopher, who was yet the "Master of them that know."

Who dare say that the power employed, the discipline displayed, and the authority asserted by the Church in its avowed purpose to Christianize and unify mankind, were not necessary to protect Western cultures from the upheavals of barbarians; and that the Church was not the political instrumentality for the maintenance of civil order amidst the fanatical restlessness of the crusades and against the influx of semi-civilized tribes? Moreover, it was the Church and its monks that kept the lamp of learning burning and who took over the torch of scientific research from the hands of the Arabs, and kept it lighted even in the darkness of its dogmas and authority.

It was, however, the quiet and sensitive ecclesiastic and student of the law, Copernicus, who, without either himself or the Church realizing its religious impact or scientific import, initiated a cultural revolution that was subversive of Christian faith and which later—through the minds of Galileo, who sought, and Newton, who found, the universal law of cosmic control—destroyed forever the authority of Aristotle. Copernicus could not accept Aristotle's doctrine of "natural places" or his theory, as stated by Ptolemy, that the celestial bodies moved daily around the fixed earth; and so he was the first to apply the facts of relative motion to the solution of the movements of the planets. He revived the teachings of Pythagoras and Aristarchus, concluded that gravity is the integration of all matter and demonstrated the annual revolution of the earth and the other planets around the sun as a centre and the earth's daily rotation on its own axis.

The far reach of the Church-State's dominion over the individual ended with the change of Ptolemy's geocentric to Copernicus' heliocentric conception of the universe and the cessation of the dominance of Aristotle, which through the centuries had retarded rather than contributed to intellectual progressive growth, since it confused scientific concepts with religious, political and ethical values and ignored the experimental determination of the realities of the laws of nature.

Disservice and Contribution of Religious Wars:

THE SIXTEENTH AND THE SEVENTEENTH CENTURIES were of religious wars; and the latter century was without a decade of peace and scarcely three successive years without wars of politics or religion or for trade or land, between nations for dominion and colonies or among princes for supremacy or peoples and classes in conflicts for power. And yet in the darkness and despair of these times, there were eyes that saw new universes and minds that gave certainty to the basic laws that govern life and underlie all of the sciences; and that conceived new theories of the philosophy of individual being, political organization and societal relations. It was the emotional intensity of these conflicts of creeds, sects and religions that made all who pondered the problem of man in association to become partisans and zealots; induced the thinkers to revive for more accurate statement the doctrine of sovereignty and the fundamental function and form of human government; and evolved from conditions of hate and blood the revolutionary principle of the separation of State and Church as the greatest contribution of reason to the order of society and to the freedom, tolerance and justice of mankind.

In the consideration of these problems, two streams of thought flowed from as many distinctive sources: (a) The religious protest as conceived in the divine will and (b) the growth of the common law as declared by man.

It was the inherent difficulty in discerning a practical method for declaring what was conceived to be the law of nature ordained of God that drove human thought, in its purposive desire for peace and order, to the

necessity of striving for freedom of belief and worship. Thus, finally, democratic methods in religious organization emerged and religious freedom and political liberty became integral when religion was separated from secular government.

The reign of law, before which all are of equal rights, as the supreme force in the relations of men under a government by the people for their welfare, is the contribution of that body of lawyers and judges who in the confidence of man's ability to govern himself courageously stood for the supremacy of law to which even the king was subject. They diffused among the people the faith that every English subject was born with an innate human right which arbitrary power could not abrogate; and finally, formulated the great declarations of fundamental rights and liberties upon which governments of representative democracy rest and constitutional law is founded.

Contributions of Dominant Theories of Revolutionary Rationalism:

THE MERGING YEARS of the eighteenth and nineteenth centuries were periods of revolution and war in Europe and America. The new continent saw conflicts among nations for colonies and between a pioneer people for individual liberty and independence from the mother nation; and France in Europe, although in civil strife, led the nations of the world in the emergence of political, religious and economic freedom from feudal bondage and the absolutism of church and king and then fell prostrate at the feet of Napoleon. During these revolutionary struggles, minds were approaching in scientific manner all problems of the earth as a planet in evolution and of all human life in association under governments and religion by them conceived and ordained.

Harrington, Hobbes and Locke dominating the political thought of the seventeenth century, gave to the political reformers of England their abstract principle of political organization and social reform, which so balanced the fervor of revolutionary struggle as to found a new nation on inhospitable shores with the theory of a new kind of absolute sovereign. Their conception of the sovereign is not Filmer's individual king, the suc-

cessor of a divine patriarch, but rather is the power of a citizen-ruled representative democracy to which all must submit.

It was the ideal Commonwealth of a dreamer of theories that gave stability to the base and form to the structure of American constitutional government. Harrington's *Oceana* suggests the principles of the delegation of functions of government and the separation of the powers delegated with complementary checks and balances. Two fundamentals emphasized by Harrington should be repeated at this time when faith in mankind's ability to govern itself is challenged and we despair of our freedoms.

He adjures (a) that liberty is lost when men and not laws rule, that electors must establish their sovereign government of equilibrium based on laws and not men; and (b) that all who exercise the franchise in the choice of a government of laws should have an economic interest in the government to the purposive end of an "equal commonwealth" attained not by equality of wealth distribution but by balance of economic forces within the political state to the equalization of both political and economic relations among men.

Hobbes and Locke accept the fundamentals of Harrington, jointly contribute a new conception of state sovereignty and are of similar conclusion in acceptance of a *static* political and social state. There is, however, a fundamental difference between Hobbes and Locke. Both the state and government to Hobbes evolved for the doing of the sovereign will and are independent mechanisms caused by fixed laws similar to those of motion in the physical world; but for Locke the psychological element in the individual precedes a similar principle in the great society and is antecedent to the state, which is organized by individual contract and community compact. Thus, both the state and the government, by the consent of the governed, become the custodians of the sovereignty of the people ordained by a majority as trustees for the individual's three fundamental rights of life, liberty and property.

This denial of a *dynamic* element in the development of society seems opposed to the psychological concept of the evolution of the state, but it

is the logical sequel to Hobbes' assumption that state and government are the institutional results of the mechanical and fixed forces of chance and nature without any psychic energies other than the emotions of fear and desire for life, which are common to all animals.

One wonders how both Locke and Montesquieu, in their efforts to evolve human institutions for the doing of justice under principles of law, could limit the function of the state to its police power of maintaining order, and make neither suggestion nor idea of either the individual mind or the state as a dynamic agency of social welfare of either individual or group progress. For Locke was one of the first to search for and apply mental processes to individual and social life, and his fundamental doctrine is that experience, acquired alone through the senses, develops the desires of individuals and molds institutions for their governance.

Montesquieu's contribution to the philosophy of law, moreover, is his assumption that the form of government reflects the psychology of the nation; and so makes man's organic necessities the foundation of societal institutions, and with Harrington, emphasizes economic conditions in human development. He contends that environment is the dominant force in determining the nature of law; and while he postulates "the world is not ruled by fortune," yet he assumes it is controlled by moral and physical causes, but not by any energy of the human mind.

Contribution of Revolutions of Violence to Justice:

MINDS OF INTENSE CREATIVE ACTIVITY followed the religious wars and preceded the American and French revolutions with disclosures of political wrongs, portrayals of secular and church abuses and avowals of justice denied by privilege and status, which aroused the people against the authority of both the state and the church.

There is, however, a fundamental difference between the two revolutions—the French revolution was political only in its aspects and purposes, but the American was both political and economic in its causes and effects. The former was the natural revolt against the accumulated wrongs and injustices of secular and religious rulers. The aroused intellectuals of

France gave their thought more to the solution of the problems of government than to economic conditions and social relations, contending that men must first be free to choose their institutions and administrators for the doing of justice before they can supplement their equality under law with the formulation of equities in economic relations.

The war of separation of the American colonies, however, followed their prolonged protest against unfair economic preferences given, unjust taxes exacted and political representation denied by the mother-nation. The English pioneers in America wished only to be regarded as sharers with their brothers at home in a joint heritage of a common law for their equal governance. They wanted to be permitted, with proper representation in that government, fair economic conditions and impartial justice, to work their destiny as free men in a new country; and this as their contribution to the diffusion of Anglo-Saxon culture and the extension of British trade throughout the world.

This individualism was not only the radicalism of political agitation, the physical exuberance of pioneers in subduing a new country and their exultation in overcoming a stubborn monarch; but psychologically and essentially, was the reaction of the victims of religious persecution, of government interference in industry and commerce in the control of production, wages and prices, of the grant of monopolies to the favored few, of the abuse of privilege and authority in oppressive exactions, of the tyranny of status over labor and of the arrogance of station over the lowly.

Denied this privilege, the sufferers of discrimination and victims of oppression recalled to memory the rebellion of their forefathers against the tyranny of the Stuart kings, first became receptive to and then imbued with French revolutionary thought, declared their right to be an independent nation and finally established a government ruled by themselves under a constitution by them ordained.

Individualism then, utilized the inherent right of revolution and the instrumentality of a written constitution to place limitations on absolute power by whom or however exercised. The human rights ordained by the

Constitution of the United States in their religious, political and economic aspects, were first proclaimed, in a solemn Declaration, to be endowed by the Creator as inalienable and enforceable by a government through just powers derived from the consent of the governed.

The outstanding characteristic of our Constitution is its assumption of confidence in the individual so to use its checks and balances that the functions of government will conserve his rights of freedom, religion and property by reading the body and letter of the Constitution in the thought and spirit of the Declaration of Independence. Thus, the aspiration for justice as defined by positive law and the law of nature, as impressed by human morals and as found by reason, proscribe arbitrary authority and prescribe the rules of human law to the equal justice of all, which is man's foundation right and the ultimate purpose of all law.

The wide gap that separated the individual from his government, the great discrepancy between his political wants and his means for satisfying them and his passion to make real his aspirations, caused him to think of his rights as man; and thus was ushered in the age of reason. The idea of natural rights was as explosive in the spheres of politics and economy as atomic energy now is in the physical world. It overturned states and beheaded kings, it revolutionized social structures and destroyed their group control, and it founded a new nation on a new continent.

Reason and conciliation applied to revolutionary individual freedom evolved the Great Charter, the Bill of Rights, the Act of Settlement, the Petition of Right and the Habeas Corpus Act. These great compacts of human rights wrung from unwilling kings and granted by reluctant Parliaments, are the sources of English and American constitutional law and are man's priceless heritages. They are the foundations on which the structure of a representative democracy in politics and economy is builded under a fundamental law which promulgates the liberties of man and ordains the form of government which protects and perpetuates his rights and places limitation on his power.

Individual property, freedom of speech, of religious worship, equality

before the law, due process of law, trial by jury and the guarantees against attainder, ex post facto law, impairment of contract, unusual search, arbitrary arrests, infamous punishment, self-incrimination and the right to be confronted in open court by the accuser, were rights which our forebears made the basis of their Declaration of Independence against the arbitrary acts of a stubborn king and under the constitution formulated by them.

The doctrine of natural liberty means the freedom of one cannot interfere with the rights of another and so the principle of utility must determine where my freedom ends and your rights begin. It is consequently limited by the principle of general welfare, the test of which is the greatest individual happiness which is to the good of the greatest number. It should not be assumed that a man has the natural right to food or shelter, or for anything from his government except in the stress of emergency. His rights under his government are limited alone to equality before and under the law.

This means that government shall give to all men equality of opportunity to have rights, equal protection to each individual in his effort to supply his wants and equal consideration when the reciprocal rights of individuals or of the group are in conflict. It is the ignoring of the fundamental right of man to have rights and the assumption that man, without emergency and except in strain of life necessity, has a natural right to State aid, that make for group domination and class aggrandizement, with its consequent limitation of individual freedom, its invidious and insidious class distinctions and the ultimate overthrow of free governments. which by fundamental law restrain power from destroying the inherent rights of minorities or of even one individual.

Chapter Two

CONTRIBUTION OF MODERN WARS TO JUSTICE

Global War and Struggle for World Power:

THE FIRST WORLD WAR was fought ostensibly to make the world safe for democracy, with emphasis of its political aspect and less attention given to either a democratic or just economy. Our last global war, however, was preceded and followed by the most extensive and intensive manifestation of mind energy in the making and use of things for the needs, comforts and happiness of man than ever had attended his efforts. Man's inventive genius in the years preceding and during the war just ended and after the peace had eased the grip of its passions, has found and harnessed electrical power for use in new ways and over great areas; has tapped the vitals of the earth for new uses of gases, oil, metals and stone; has developed a new science in the borderland between organic and inorganic matter; and has found in atomic fission an explanation of universal energy and the means of developing its beneficial uses as well as directing its devastating forces.

In truth, man has transformed a world of unfilled wants into a world of plenty and has diffused the goods of human satisfactions and of cultural growth far beyond the dreams of the most sanguine; and also, at long last he has armed humanity with an instrumentality of such force as to annihilate the outlaw nation, and may have now the means to make more probable and durable world order, and universal justice under a united organization of nations.

Nevertheless, a quarter of a century after the first world war and in the midst of this instant expansion of the human mind and the accumulated achievements of its purposive aspirations, we are just now beginning to awaken to the realization that, notwithstanding the lost and maimed lives

and the ruin and horror of war, there must be a relation between war and material expansion and the human mind's ceaseless curiosity and insatiate desire for the acquisition, control and use of things, trade and land.

This restless curiosity, with attendant strivings which soon become needs, if not restrained by reason or composed by conciliation, or directed by justice, leads inevitably to increase the greeds of individuals, the aggrandizements of groups and demands of nations. And ultimately, must come such intensification of individual and group interests, of all struggles and aggressions of men and nations that violence, as the last arbiter of power, will end the barterings of greed and fear and again become the master of man's destiny.

Democracy as Mechanism for Governance:

IT IS THE NECESSARY ACCEPTANCE of the fact of struggle for power in political association and in economic effort that sustains our confidence in the assumption that representative democracy is the best mechanism man yet has invented for the reconciliation of group welfare with individual satisfactions, both under the governments of nations and of a world organization of nations.

This confidence has induced the deepening conviction among increasing numbers of earnest and forward-looking minds (a) that the present strife among workers for the control of their unions and between them and their employers for higher wages, better working conditions and a just economic interest in the joint venture; (b) that the intense struggle for survival between private property and its form of capitalism and collectivism with its sequel of communism, and (c) that the strivings for supremacy between class totalitarianism and representative democracy—all and single, are the *inevitable consequences of man's atavistic lust for power activated by the worthy purpose of self-realization that naturally motivates his seeking of it or of his callous indifference to the nature of its use.*

These struggles among individuals, groups and nations for power over interests and things in politics and economy and of nations for dominion over peoples and lands, neither the organization of nations nor any form of

political association can prevent as against an outlaw indifferent to the hazard of annihilation. The world government of nations and the separate nations now can and should seek to equate the inequalities sanctioned by positive law; and must strive to remedy all tendencies of authority or privileges toward injustices among men and nations. And to this end the Organization of Nations, in order to endure as the instrumentality of world order and justice, should be delegated the power and—with or without the explicit grant of power, veto or no veto—must crush the aggressions of any outlaw nation that dares rebel against the sovereign decrees of world order and universal justice.

Chapter Three

JUSTICE AND SOME DETERMINANTS OF CIVILIZATION

Justice, Freedom, Tolerance, Balance of Power and Peace:

JUSTICE, FREEDOM, TOLERANCE, balance of power and peace are mind aspirations which employ similar methods for attaining their purposes. These means are the human interests which arouse man's curiosity and impel him to the satisfaction of what he regards as his political needs, economic wants, cultural desires and religious seekings. But there are material and fundamental differences in the nature and expression of these universal aims. The aspirations for justice, tolerance and freedom are without a conscious beginning and end only with death. The longing for repose is, however, the developed desire for freedom from war, which through the centuries has been man's predominant status, with balance of power and the human hope for concord limited to periods of but evanescent peace.

The increase in numbers of people, the marvels of power and of machine production, the speed of travel and sensitivity in communication of intelligence, the efficiency of warfare weapons which pour their devastations alike upon the soldier and non-combatant and at last, the utilization of atomic energy to assure the sanctions of justice and humanitarianism—all now, for the first time since the dawn of history, make rational the efforts to conceive some plan, and more probable the ultimate acceptance by the world's dominant nations, of some world organization of law and order that will give to more peoples on larger parts of our earth and for longer periods, relations of amity and concord.

Whether we deny the present persistence of Hobbes' primitive man of predatory animal nature, or accept Locke's individual of sensation and reason or avow the concept of a social being controlled by a creative mind for self-defense and self-realization in association with his fellows—we must assume man's first conscious activity is of struggle to survive. Conflicts with nature and human hostilities continued as normal individual life until mastery of his animal self and of others, and the conquest of the conditions of his existence gradually have given to him some intermittent periods of escape from violence.

So during the centuries, interludes have inspired the dynamic mind with the increasing desire for always longer periods of peace. Out of these strivings for escape from animal struggles, mankind through millennia has evolved the order that government now enforces, as the essential of its justice, over always increasing numbers of the human family and larger world areas, alone because of the dominance of mind over man's animal body and its mastery of the physical conditions that environ him.

Whatever the justification for past wars, the mind free of hatred and of fair judgment can conceive of but one warrant for war. No nation may injure another people in war or in peace by any act with more right than an individual outlaw may assault or take the property of his neighbor. There is but one justification for war in this modern world, which recognizes the similarity of nations to the moral obligations that attend individuals in all relations—defense against forces of violence that would destroy man's highest values of freedom, of the human spirit and of the security that maintains the equilibrium among all individuals and groups of the community of nations.

The anti-social individual must be controlled by force of government, else evils and wrongs will destroy the real values of civilization. The group, the nation or group of nations must use the force of arms to repel any invasion of its territory or to restrain the aggressive nation from any overt act hostile to the general welfare of all nations, and particularly, that destroys the balance of power among all nations of similar pattern or mem-

bers of the same organization of nations. It may be the balance of power cannot maintain peace among rival nations, but a defensive alliance against totalitarian nations that seek extension of domain and increase of power can prevent the extinction of democracies and the economic enslavement of peoples.

The world wars in the court of history have demonstrated the two fundamental defects of the principle of balance or community of power—(1) The absence of a central authority with (2) a power of arms sufficient to enforce its sanctions against the outlaw nation.

The statesmen of world polity, however, before completely discarding this principle would do well to recall its genesis in the laws of nature and of human governance. They should review its contributions to world stability and not overlook the United Nations as an instant central authority, and atomic force as the decisive power that may supply the deficiencies and remedy the defects that failed in the past to keep nations in balance.

Justice and Balance of Power as Contributions to Peace:

THE JUST EQUILIBRIUM OF POWER is one of the first of governmental theories both in priority and fundamental nature as principle. It accepts the cosmic law of balance and is founded on the law of self-preservation, for it is natural that nations should so cooperate in self-defense as to prevent the domination of any one over others.

As many political principles have their beginnings in religion, the Amphictyonic Council of the Greeks adopted the earliest known plan to stop hostilities against any city sharing in the common worship of Apollo; and so, it crudely sought some balance from war violences. Polybius refers to the principle; the cities of medieval Europe adopted it in their Italian confederated republics as a political maxim; the Hanseatic League employed it in their control of economic power; and, as feudal principles were superseded by the concept of the nation, it became the necessary expedient of both unity and restraint of national sovereignty.

Grotius first expressed the idea of federation of modern nations to maintain the peace of Europe. It was Vattel, however, who formulated the

balance of power as a principle of international law: That it is the right of nations to form a federation for peace based on their power in balance, and likewise, the duty of every of its members by force of arms, if necessary, to restrain the outlaw nation that breaches the compact or infringes the conditions of equilibrium.

It is obvious this principle can be made the excuse of war as well as its justification and that in the ultimate, the federation to enforce the balance is futile unless a strong world opinion supports its united authority by military sanctions so powerful as to hold every nation in check and to subdue the offending outlaw nation or nations.

One is then not surprised that to restore the balance was the ostensible occasion, if not the provocation, of the wars that followed the Congress of Westphalia in 1648 and the Conference of Vienna in 1814; and that it was urged as justification for the religious wars and of the coalitions against Napoleon.

The part that has been taken by England in the formation of federations to maintain the balance of power, and thereafter, its employment in the maintenance of the European peace is too often slighted; and particularly, the relation of the government of the United States to the use of the principle by England is overlooked, and reference is seldom made to the attitude of our government to it. William the Third of England was earnest in his devotion to the master purpose of his life: The restoration of the balance of power by the overthrow of Louis XIV and the defeat in Europe of the dominance of France. He went to England to secure an ally against France; and returned to be crowned monarch of the new nation, which in alliance with the members of the League of Augsburg in 1688, with a large army invaded Flanders to maintain the balance of Europe by warring on the dominance of France.

The wars of the French Revolution and the coalitions against the world ambitions of Napoleon affected the balance of power in a way not anticipated by England and her allies when they determined again to check the power of France. Napoleon's intervention in Spain plunged the mother-

country into anarchy; and trade with Spain's colonies in America dwindled, communications became more difficult and her hold on them soon so weakened that the over-reachings and tyrannies of some governors finally inflamed the colonies to revolt.

This struggle of the Spanish colonies for independence ended in their becoming the free republics of South America. And so again the power of European nations ceased to be in balance by the loss of Spanish influence and the gain of British prestige; and what proved also, to be of irreparable damage to the principle of monarchy and to the growing supremacy of democracy among the governments of Europe.

It was the threat of France to aid Spain in the reconquest by force of the latter's lost colonies that moved England to aggressive action, promptly and formally to recognize the independence of the new South American republics; and thus to assure maintenance of England's dominance in Europe, which she had won at so great a sacrifice of men and money in overthrowing the power of Louis XIV and the pretensions of Napoleon.

Again England had preserved the balance of modern Europe, but that splendid achievement of diplomacy was soon to be dwarfed in the full realization of the significant nature of an event which had contributed to that result and in the revolutionary and enduring effect on world opinion of the international doctrine which followed as its sequel.

Canning, in fear of a French-Spanish coalition, when he called a new world of American democratic states "into existence to redress the balance of the old" could have had no picture of Balfour's impassioned appeal to America to save England and democracy for world civilization. Nor could he have imagined the pride and sagacity with which Churchill, the saviour of England and of freedom in Europe, abnegated England's world leadership to the United States.

Decisive as was Canning's action against France and Spain in restoring the balance of power in Europe and for the assurance of stable government in the new American republics, more momentous consequences in the

affairs of the nations followed the United States' separate recognition of their independence. England and America, although not in full accord, as to the legitimacy of European colonies in America, were in such agreement as to make futile any effective protest of the monarchies of Austria, Prussia and Spain against the republican spirit of the new world.

Contribution of Monroe Doctrine to Peace:

IT WAS THE ENTRANCE into the international arena of universal power of the greatest and most powerful of the world's republics and the declaration by its President Monroe of its doctrine, that established for all nations a standard of conduct affecting the nations of the American continent. The vast consequences of this Doctrine were not then realized; but all nations now fully understand it as the ultimate of a continent's defense, and so accept it as an essential to the balance of world power.

Whatever their differences as to new colonies, England and America were in agreement as to the status of the old, and that no new colonies should be here established. And so the Monroe Doctrine declared in 1823 America was closed to colonial settlers; control over any independent, free and American state by any European power was forever ended; the then existing European colonial possessions would be tolerated, but on condition they shall not be extended; and that the American continent forms a distinctive political system of nations separate from Europe.

Bold was this declaration when first enunciated, and many then had misgivings as to its provoking war; but a century and more has confirmed the wisdom of its salutary purposes under diversities of climate, races, traditions and the survivals of European intolerances and hatreds. The bonds of Europe have weakened with the passing years that once held the lands of North America to Russia, England and France and those of South America to Spain and Portugal.

The United States purchased from Russia Alaska and her vast Canadian claims and the Territory of Louisiana from Napoleon; the link of Canada to the British Commonwealth of Nations is voluntary; and Spanish, Portuguese, English and French colonies are without political or trade

significance. The United States has given its form of government to every South and Central American nation, has preserved their territorial integrity and has developed a neighborly spirit among all after successive revolutionary periods had convulsed them.

This feeling of good will was molded into a practical form of defensive action when, adopting the suggestion of Secretary of State Blaine, the Pan American Union was organized in 1889 for the preservation of peace in America under its formal Declaration that "arbitration constituted the public law of the American nations." And so the three distinctive systems of North, Central and South America, under the egis of the Monroe Doctrine, have become an orderly society of nations all governed by republican principles and in economic and political balance with all world powers; and are bound by a Pan American pact to prevent wars on the American continent.

Justice and Anglo-Saxon Power as Contributions to Peace:

THE PURPOSE OF THE MONROE DOCTRINE is more than protection to the republics of the Western Hemisphere. This is the immediate necessity that occasioned its formulation; but in more universal concept, its defensive function is to hold in check any national or international crusade of autocratic power against any parliamentary government of the world. Too few recall and too many are inclined to ignore some facts essential to a full understanding of the profound need for the continuance of the present intimate Anglo-American relations in world affairs.

(1) An absolute Czar of Russia initiated and Metternich, the adroit premier of the autocratic emperor of Austria-Hungary, dominated the Vienna Conference; and later formed an alliance based on their conviction: That autocracies of absolute power must rule Europe for its peace and that the parliamentary governments would continue the wars of Europe as they destroy one another.

(2) It never has been the purpose of England's foreign policy to rule Europe, but to seek only her security in extension of her policy of colonization throughout the world; and so, England has been the needle of

balance in Europe, as the power of any nation sought to dominate that continent.

(3) England's offer to the United States of support in resisting the Holy Alliance design to reconquer the Spanish colonies, in the conception of Monroe, Madison and Jefferson, involved the immediate defense of the American republics; but in the large, it potentially raised world wide the ages old issue of despotism and freedom.

(4) Russia at that time was an American power with fortified occupancy and claims for land and water in both Canada and America from the Arctic Ocean to the Columbia River; her troops were in Paris and France was a part of the Metternich Alliance; and so, Madison in response to Monroe's request for his reaction to Canning's offer, made the courageous and far seeing declaration of the American doctrine of world justice.

(5) Our nation in effect has applied this declaration to present world affairs, as will appear from Madison's words: "Let us declare now * * * with Britain, that a weak nation, anywhere in the world, threatened by a powerful neighbor, shall receive our support in defense of its right to life." And this for the reason that "with the British power * * * combined with our own in the great struggle of the epoch between liberty and despotism, we owe it to ourselves to sustain the former."

(6) Jefferson as early as his negotiations with Napoleon for the purchase of Louisiana foresaw "a closer connection with Great Britain" and discerned the possibility of holding the Americas "in sequestration for the common purposes of the United British and American nations."

(7) In 1823, Jefferson, after reference to Monroe's "question * * * (as) the most momentous * * * ever * * * offered * * * since that of independence," wrote: "That made us a nation, this sets our compass and points the course * * * through the ocean of time opening on us. * * * One nation * * * could disturb us. * * * She now offers to lead, aid and accompany us. * * * By acceding to her propositions we bring her mighty weight into the scale of free government and emancipate a continent. * * * Great

Britain is the nation that can do us the most harm * * *; and with her on our side we need not fear the whole world."

(8) The Doctrine declared by Monroe, if not in explicit words, is in spirit and purpose the policy of world justice as conceived and urged by the three Presidents and as now avowed by our government; and events have so changed world conditions that the suggestions to restrict its defense of freedom and confine its justice alone to the American hemisphere have died with their authors.

(9) The uniting of the states of Europe into a political federation has been envisaged by thinkers for six centuries. Plans for a united Christian Europe against Asiatic peril and Mohammedan invasion or for just government or to assure peace, all have come to naught, as much because of England's indifference as the chauvinism of its national loyalties. Now that the world wars have made England dominant in Europe, she and the free nations of that continent, with or without alliance with Russia, must at no distant day form a political federation to the end that with the foundations of stability so laid in representative government, the problems of economic security and opportunity may be solved in a justice that crosses the boundaries of states.

(10) As nations of the British commonwealth, with their fast increasing millions of people and incalculable sources, develop and dominate vast parts of the earth and Anglo-American freedoms become the universal aspirations of all peoples of the world, so there are now none, except the dictators of economic and political power and their supine victims, who question the humanitarianism of the American Declaration of universal justice and freedom for longer periods for the nations of all continents.

XII

UNIVERSAL JUSTICE
UNDER UNITED NATIONS
ORGANIZATION



Chapter One

ANATOMY OF PEACE AND NATURE OF UNIVERSAL ORDER AND JUSTICE

Abnegation of Sovereignty not Peace Panacea:

PEACE AND WAR define conditions and attitudes of mind in contrast, but justice partakes of all aspects of things and relations in its effort to equate differences and reconcile conflicts. War is the violence, in armed conflict, of nations or sovereign groups for power; or of hierarchies of race or religion or of a communal way of life for mastery or dominion; or of ideas of freedom and justice for survival against an outlaw or enemy sovereign group. Peace is the tranquillity of appeasement and repose of disciplined minds; and justice is the avowed aspiration, in both peace and war, of humanity for the welfare, happiness and self-realization of man. The victor, by the force of arms, imposes his conception of the right, however cruel or unjust; but all in peace seek to achieve justice by conciliation and compromise of opposed interests in controlled competition.

We regard anatomy as the science of structure or form, and but figuratively of a condition or mental process. An outline must be meticulous in its analysis of the parts and complete in its synthesis of the structure, idea or status as a whole; and in its statement of function should not indulge in doubtful assumptions to support, in obvious zeal, a questionable thesis.

There can be no war without pugnacious sovereignties; and it is to pack much error in an over-simplification of an anatomy of peace, to urge the abnegation of sovereignty by all nations that one world power may be evoked to end war. For the dwelling together of America and Canada

eliminates contiguity of nations as causal of war and the conflict between the Confederate and the United States, one time constituents of the Federal Union, demonstrates the unification of states or nations under one government is neither the sole panacea for peace nor a guarantee against war. Moreover, a state never voluntarily has relinquished dominion or surrendered sovereignty except later to assert either by force, if necessary, for the protection of its vital interests.

Through the centuries, wars successively have been waged between sovereign organizations not because they were families, tribes, clans, cities, fiefs or nations, but alone for the reason every one of them in its time, whether constituent or integer, was the implement created by man for the definition and defense of his interests, the maintenance of power for his aggrandizement or the preservation of his civilization which he feared was imperiled by the outlaw barbarian or enemy group.

Ultimate Sanction Against Outlawry:

IT IS TO IGNORE THE LATEST BASIC DISCOVERY OF MAN, and potentially the most vital, to the continuity of his civilization, to assume that wars must continue because sovereignties in the past have been impotent to crush the outlaw nation. Man now knows atomic fission as the most devastating manifestation of cosmic energy; and he may assume it to be *the ultimate sanction under the law of nations in united organization to preserve world order.*

The meliorist, whose foundation moral law with its aspiration for justice is of a cosmic appetency, needs no additional reasons to sustain his abiding conviction that universal law ultimately will govern a federated world. He consequently is inclined to scrutinize with cautionary misgivings a world parliamentary government proposed *immediately* to consummate this auspicious event. He questions some of the suggestions made to sustain its prophetic truth; and he condemns other considerations which are in the nature of dogmatic assumptions, without qualification, or radical asseverations without limitation, and, in effect, are destructive of nationalism as the efficient builder of Western cultures.

We who regard conflicts of interest and the failure to restrain under law, or to hold in subjection by necessary force, the outlaw or aggressor nation as the real causes of war, and who believe the nation is the last and best tool of social structure evolved by man for his just governance and the security of his civilization at ever higher levels must urge:

(1) *It confounds the function of law and fundamentals of government and ignores the significance of mind, as the dynamic force in human development, and of justice—to suggest that “the transfer of sovereignty from the nation-state” to a “world governed by law * * *” is the “sole preventative of war.”*

(2) *It is in denial of the power of atomic fission to enforce legal sanctions against the outlaw as the ultimate of justice among men and nations—to avow “as absurd” the “idea that sovereign states can be coerced by a majority of other sovereign states.”*

(3) *It is to overlook human interests and aspirations as the sources of human law and justice, and to disregard their conciliation and realization as the essential purpose of life—to assume “the real conflict of the age” is “between industrialism and nationalism.”*

Mind, Atomic Fission and Nationalism as Essentials of Order and Justice: A GENERAL STATEMENT OF THE SCOPE of this challenge should precede consideration of its specific counts of error. The driving forces of civilization all emerge from the family and are directed by man's mind, whose loyalties through the ages have been to the gods of his fathers, the hearth altar of worship and the land of his birth; and whose pride is in the interests and institutions of his family and of the groups and, finally, the nation that grew out of it. Neither religion nor patriotism easily can be taken from the heart of man; and he indeed is of sublime hope, who believes either the victor or vanquished in peace will embrace a new loyalty to a world state and abandon much of his love for the nation to which in war he in full measure gave the duty and devotion of service and risked the supreme sacrifice of limb and life.

It is futile to talk of civilization's being “determined on suicide” unless

nations immediately transfer their separate sovereignties to a dominant world-state that knows not the patriot's love of country, nor his sacrificial heroism, nor pride of his citizenship, nor the desire of his consuming purpose to achieve for himself in peace and to shield for all in war the things by him deemed sacred. If this relinquishment of sovereignty by the nations is to be absolute and without limitation, there should be at least some regard for the loyalties of life which too often are sealed in the martyrdom of death, or a modicum of consideration ought to be given to the patriotism of citizens, who now are the veterans of wars their nations fought in order to preserve freedoms and ways of life distinctive of their cultures.

Chapter Two

ORGANIZATION OF UNITED NATIONS AND UNIVERSAL JUSTICE

Public Opinion Foundation of United Nations:

THERE MUST BE, OF COURSE, the hard beginning to everything; and the raising of the masses of mankind to higher levels is the task of Moses-like souls who know not defeat in frustration. Analogy always allures to the answer we seek, so the pacifist in the zeal of his idealism assumes everlasting peace, as certainly and *contemporaneously* with one world government, to emerge from the global war just ended. In his sanguine hope of an instant world-state to keep the universal and eternal peace, he discerns the rope of sand Articles of Confederation in the exalted platitudes of the Atlantic Charter.

And as the Annapolis convention issued its bold mandate for a Philadelphia convention to draft a constitution for the United States brought forth the first government of free men and destined leader of nations, so now from the United Nations Organization is envisioned a call for a convention of the nations of the world, to ordain a constitution for a world government that shall hold all nations to order, as, with justice, nations now govern society under law.

To recall the story of man's obedience to government is to demonstrate the error of the analogy and idealism of this vision. For there can be no free government of either free nations or of free men *without a public opinion to sustain it*; and this assumes individuals capable to create, mold and enforce it under conditions of equality of opportunity and of free enterprise. Nor can government be either representative of its people

or just to all in administration, unless a deep realization of personal responsibility impels every citizen to support loyally the nation or world-state in the assertion, under law by it ordained, of its sovereign will against the outlaw individual or nation.

Representative government sanctioned alone by public opinion exists today in but few nations. Power, not reason or individual loyalty or responsibility, and the force of arms, not the justice of free minds, rule many of the nations and vast areas of the continents and islands of the seas, whatever in name the form of government. How can great masses of people, yet in tribal civilization, and many in the stone age, who know neither the aspirations nor experiences of freedom and are ruled by the violence of authority, form in a year or decade a nation constituent of a world government of free peoples?

The answer is obvious—a world government representative of the peoples of self-abnegating sovereign nations can be organized only by nations whose peoples, after persistent striving, have attained the capacity and developed the purpose to be just and the will to subject to world order, or to destroy, the outlaw nation.

United Nations Organization as Mechanism of Conciliation:

THIS DOES NOT MEAN THAT—in repudiation of the sphere of influence idea to preserve peace by military alliances and in acceptance of the concept of free nations governed by free peoples pledged to avoid force in domestic affairs and to join in the use of force against any aggressor nation—the world organization, formed at this time as an aid to further the tendency towards universal order under the sanctions of law, will either languish or die because suggested as premature.

Such organization must continuously develop in vigor and power; for although dictatorial autocracies may continue to rule as representative republics, they finally will merge with or be dominated by the free nations. And so will be organized a realistic world structure with both the right of *qualified veto reserved and the power granted through control of atomic energy to curb the anti-social or crush the outlaw nation by force of the*

legal sanction of arms—since there is no absolute veto to the conscience of humanity that condemns outlawry.

Many years, it may be assumed, but less than many now anticipate, will pass before a world-state with absolute sovereignty will rule the trade, industry, economy and politics of all mankind. For there is a world conscience, however feeble, that voices the protest of humane millions against injustice, however lowly or weak the victim, individual, group or nation, or wherever found. It is this universal sense of justice which finally writes the decrees of history, whether promulgated by the force of world war or though only a small part of the common folk are represented in the government or its official branch that corrects the wrongs—as witness Abyssinia and Korea restored.

When the minds of all men and of all nations begin earnestly to ponder the conduct of individuals and of nations, and its moral aspects as provocative of injustice or causal of war are discussed wherever men congregate, we may assume a public opinion must soon develop adequate to sustain a constitutional government with the sure sequel of its dominant power in universal order and world affairs.

A world Organization, however, and the separate nations first must co-exist with such power given to the former and sovereignty reserved by the latter as the citizens of the nations determine is essential to the functioning in justice of both world Organization and national governments to the security of world society and individual or group welfare.

No United Nations with Absolute Veto:

UNDER THE CHARTER AS PROMULGATED, no nation has surrendered its sovereignty to the Organization, since it gives to any one of the Big Five nations power arbitrarily to veto any action proposed to the Security Council, which finally determines all Organization action. The vital question then presses as to how the power of the Organization can be used against one of the nations of the Council to end its lawless aggressions.

No absolute veto can be vested in one nation without making the Organization itself an outlaw, if it should declare war against a nation

which, in legal right, exercises the power of veto for its aggression or arbitrarily. The Organization can utilize atomic energy for the preservation of world order only by an amendment to or by an interpretation of the Charter which would permit it to move against the outlaw nation on authorization of less than all of the Big Five of the Council, involving armaments or conduct that imperil the peace.

Jealous as nations should be of their sovereignty, they expressly must delegate to the Council, or so construe its Charter as to grant, the power to determine all sanctions of atomic fission affecting questions of world peace by less than the votes of all of the Big Five and two of its member nations, lest the Organization continue impotent to preserve order among either nations or peoples.

The Charter may be amended either (a) by the voluntary renunciation of all of the Big Five, or (b) a majority may deprive any one of them from exercising the veto in a dispute involving world peace to which it is a party. This latter method involves a necessary construction of the Charter, if the United Nations is to continue to function, when one of the Big Five seeks to justify its veto on the contention that it is not a party to the dispute or denies the issue involves the hazard of war.

This outlaw attitude of one nation would make the future existence of the Charter depend upon the courageous members of the Safety Council registering their liberal construction in accord with its explicitly avowed purpose to maintain world peace. Force may not be the only, but it is the final appeal that can revise the Safety Council's interpretation of the Charter against an arbitrary use of the veto; but the United Nations is without choice—world order can be maintained only by subjecting the aggressions of the outlaw nation to the sanctions of the United Nations' military power.

Chapter Three

PREVENTATIVES OF WAR AND SANCTION OF JUSTICE UNDER UNITED NATIONS

Mind and Justice as Preventatives of War under Organization of Nations:
IT IS MY THESIS that man cannot regard with favor the dogma of emergent evolution without his acceptance of a cosmic purpose as the fundamental law of meliorism. The individual welcomes belief in always more harmonious integrations, more sensitive minds at higher levels and his ever more overpowering aspiration for justice under law in his eternal effort to realize his free personality as one in equal right of all individuals.

He must in theory join as citizen of the world, St. Simon, Bodin and other dreamers of universal justice, attended by the vision splendid of Tennyson's "parliament of man, the federation of the world;" which Kant concluded "however visionary * * * and ridiculed * * * is nevertheless the inevitable * * * necessity * * * which must compel the nations to the very resolution * * * to which the savage * * * was compelled when he had to surrender his brutal liberty and seek * * * security in a constitution regulated by law."

An anatomy of peace, however, that does not include mind as the vital contribution to its primary purposive functions of security and justice is but an outline of a body without a head, or brain of man without a mind, or of a mind without personality and of both man and his civilization as alone materialistic without either ethics or justice.

Geneses of War and Abolishment of Outlawry:

IT IS A ROOT FALLACY to assume the sole cause of war is the particular nature of the organization which precipitates and carries on the fighting.

And so, utterly (a) to ignore the human mind, as the force of universal justice which seeks to reconcile the conflicts of human interests, and (b) to forget the will of civilization to survive against the outlaw, as the real drives of sovereignties to war—whatever their form or structure or however vulgar or cultured the contending civilizations or crude or elevated the opposed concepts of justice.

For the nature of the sovereignty changes and the interests may become national instead of family, tribal or feudal; but they never cease to be human, and every organization in war risks its existence in defense of its idea of divine justice—since all assume God's favor.

Eternally, our material interests, graspings for land or trade, ideas of right, ideals of culture and of freedom, ways of communal life and pride of race or of achievement, or the certainty of divine favor—are all potential of conflicts of violence. These are the geneses of war between groups, which as separate nations or alliances of nations within or without one world organization contend for their interests and power; and strive for the satisfaction of their aspirations or defend freedom and seek justice against the outlaw nation or against the anarchistic group rebellious of national or world authority under the rule of law.

However alluring the analogy of the American dual federal and state government, or attractive the picture of all nations ruled by universal law as enacted by a world parliament, or whatever the certainty that such is the destined course and sequel of human justice,—the instant realization of such world-state, full fledged at its birth with supreme authority under dominant sovereignty, is but wishful fantasy. The realities that now forbid this ideal, however, only postpone its realization, and relentlessly drive humanity to the vital need of some form of world organization of nations to subject the outlaw nation to the authority of universal order.

The bow and arrow gave to primitive man food and security, the discovery and control of gun-powder held all civilization to order as it destroyed feudal oppressions and made men free and the certainty of detection and punishment of the individual outlaw increases with the improved mechanisms of science and law. Out of the present efforts of na-

tions to control and direct the use of atomic energy, the functions of the United World Organization must hold all nations to order and, in the common defense, subject the outlaw nation to its devastating power as the last awful sanction of world law.

Atomic Fission As Ultimate Sanction of Justice:

THE MIND HAS NO COMPASS that holds man always to the right way of human progress; and experience alone can give light and direction to the course the aspirations for justice lead humanity. There is however, one human test and constant standard of justice that all may accept. Man has never ceased to move forward so long as and when, he or his society has held in restraint the outlaw and has maintained against wrong the status deemed for the good of all.

Here may be found an answer to the confusion that would make nationalism and war the causes of all the malignant ills of mankind and the abolishment or emasculation of national sovereignty the sole panacea in the search of peace. The principal source of man's afflictions, exclusive of nature's chastisements or individual delinquencies is the injustices, intolerances and wrongs which breed the anti-social and anarchistic outlaw and his criminal conduct in the vicious circle that repeats them.

Peace in a competitive world is not an absolute in universal society, nor can it ever be attained permanently alone by the extinguishment of national sovereignty. It is the experience of mankind that repose comes to the individual mind and the status of peace to nations alone as the attendant result of human justice, which in truth is the Holy Grail of man's eternal quest.

Let then justice become the rule of life for men and nations by negative act of restraining the outlaw and by affirmative effort of common security and general welfare, and war will cease to be necessary as an ultimate either to defend man's freedom or to preserve his order, security or welfare. Reform or punish the anti-social individual and hold in leash the outlaw nation; but give to all men freedom of thought and action and

regard every nation as an organization with limited sovereignty, and there will be violence only to the degree force is necessary to preserve order by restraining the outlaw individual or subduing the aggressor nation.

Force has been man's sole, and must be the ultimate instrumentality of human justice which he can apply against the individual outlaw with the sanctions of increasing power at higher levels and in enlarged diffusion over wider areas because of his more efficient groups or national organizations.

Mankind has failed, however, to restrain the outlaw nation and to hold world society to order only because it has always known the fear of its impotence against a ruthless and powerful nation.

The will to save the things vital to free men prevailed against the Nazi second assault only because the nations in alliance realized the menace of aggrandizing outlawry to Western cultures, and in zeal for justice and freedom with valor met violence with overwhelming force. Out of the horrors and at the price of war, from the mind of science has come that engine of nature's destructive energy which all minds of realism and foresight had envisioned and hoped for as the most probable, if not the only, means to end war.

With this weapon of atomic fission at long last in man's hand to enforce his sanctions of universal law among nations and men, his now is the sure, swift and decisive power to destroy the outlaw nation that dares challenge either his determination to be free or the will of the nation to preserve civilization in their supreme faith and purpose that justice shall rule nations, as by nations their governments now restrain the individual outlaw.

Man then is without choice, for the scientist has given to him such knowledge of destructive energy that civilization has but one escape or defense against its use by an outlaw nation. Humanity by action of the nations in concert under authority of their law must prevent civilization's destruction. Since the force of annihilation is global, separate nations are

impotent and a world tribunal has been organized by the nations with power to enforce its sanctions, explicitly by use of atomic fission, against an outlaw nation. There can be no veto by any one of the Big Five nations of the Council in any matter affecting the use of this extreme sanction. All nations must unite to annihilate the outlaw nation by the use of this awful weapon or it will be utilized by the outlaw aggressor to destroy civilization.

Chapter Four

PRESERVATION OF NATIONAL SOVEREIGNTY AND WISDOM OF ORGANIZATION OF NATIONS

Nationality and Sanctions of Order and Justice:

THE VITAL NEED OF A WORLD ORGANIZATION of the nations for security and to save civilization from science's appalling discovery neither involves nor justifies, however, the abnegation by nations of their sovereignties as separate states to a world-state that shall govern all mankind; nor does it require the relinquishment of any part of their power to regulate the domestic affairs of their citizens. But it does make imperative the delegation by all nations of that segment of national sovereignty which vests in the world organization of nations absolute control of and dominion over atomic fission as the supreme sanction of world peace.

Besides the foundation laws of integration, equilibrium and fitness, the vital principles of individual development and of social change, the economy and polity of governance, moral conduct and religious worship and our aspiration for human justice are all involved in the weakening of nations by their transfer of sovereignty to a world-state. Delicate questions and momentous issues admonish of the peril to man and to his civilization of the relinquishment of national sovereignty to a cosmopolitan government under a world constitution of over-all sovereignty. The foundations of world order and of the nature and existence of human justice as opposed to the force of power abide the decision of so basic change in human relations.

Wisdom of Nations Organization Instead of World Government:

THE FOUNDER'S OF THE UNITED NATIONS ORGANIZATION accepted the fundamental law of development—that the new grows out of the old, and but applied the wisdom that assures its enduring contribution to peace and justice—when they promulgated a union of nations which reserves the sovereignty of each in preference to the formation of a world constitutional government with dominant sovereignty over all peoples.

Their statesmanship was undeceived by the allurement of analogy or dream of idealism. They avoided obvious perils to the foundations of human governance, when they discerned the confusion and chaos that must follow a world government which rules its peoples under universal sanctions of supreme sovereignty derived from the citizens of nations that had abnegated their respective nationalities; and who, in sufficient numbers, are incapable of formulating a constitution and lacked the capacity to support, a public opinion adequate to sustain free government.

The Organization, in accord with the Atlantic Charter, finally declared against a legislative branch representative of the citizens of the nations; and determined the Assembly could discuss questions of peace and make recommendations to the Security Council. With sagacity, they constituted its eleven representatives of the nations the real tribunal of world authority to investigate international disputes, investing it with final power to move against the aggressor nation through the immediate and definite control of the Military Staff and Atomic Energy Commission.

These founder realists then with the guidance of experience, the avoidance of the errors of speed and idealism and with rare confidence in the ultimate realization of man's strivings for justice, brought forth their organization with the assurance of faith, as in a Divine Plan, that out of war always come the great forward strivings of civilization with ever new frontiers of invention and discovery as the sciences unfold and apply the laws of energy to human life and its relations.

As conservative meliorists, whose belief in the constant evolution of a better world is as fixed as their purpose to make certain the building of

a secure super-structure on the foundation bedrock of the nation, their organization is not of a world government with nations abandoned as sovereign guardians of the people's love of land and their traditions, laws, customs and aspirations for freedom and justice.

The primary purposes of their organization are for world order, security and justice; its controlling branch for the function of its power is the Security Council dominated by the world's strong nations and the ultimate of its sanction of force is atomic fission invoked directly against the outlaw aggressor nation, but also in coercive effect against the citizen of individual guilt.

Necessity of Force Against Nations Instead of Individuals:

THE WISDOM OF FORMING AN ORGANIZATION representative of nations instead of a government under a world constitution for the maintenance of world order through control of atomic fission as preventive of war is again demonstrated. For wars are waged by nations and can be averted at their inception or ended after hostilities only by the sanction of coercive force against the outlaw nation and not against the individual offender. Of course, both the world organization and the nation in the exercise of police power should control and inspect the production of all chemical elements and may regulate by system of license the experimental activities of individuals affecting cosmic explosives.

But governmental control of devastating elements or punishment of the individual offender by the world organization can neither prevent nor stop war, started or waged by a nation aggressor; nor will a nation outlaw punish an individual citizen for producing the weapons it seeks for the destruction of an enemy nation. To urge the punishment of individual offenders against peace instead of crushing the outlaw nation even by the ultimate of war, as an escape from the extermination of masses of innocent people who wage it, is to ignore the distinction between an organization of nations for world security by control of world devastating atomic fission and a world government by legislative fiat under one world sovereignty.

Separate Veto and Supreme Police Power:

THIS DISCUSSION, conclusive of crushing the outlaw nation as the only way to end war, dogmatically assumes that science in fact finally has armed mankind with a sure weapon and the United Nations Organization is the only agency that can use atomic energy as the supreme sanction to police world order.

It is conceivable means of defense may be devised to lessen the destructive power of this weapon, or, however fanciful or hazardous, that the nations which invented it voluntarily may outlaw its use as a weapon of war. But in either event, all of the Big Five Nations must renounce the veto power or limit its exercise as above construed as the one essential of universal peace—for an absolute veto used by a nation in its pretended defense or for aggressive purposes means a potential outlaw nation that war can alone annihilate.

America, England and Canada, upon their faith in the sanctity of treaty sanctions, accepted by all nations, may seize and hold in reserve the raw materials and may destroy the vast mechanical piles and intricate mechanisms for making the A-Bomb. But no nation or government can take from the human minds, whose genius discerned and applied atomic fission, the knowledge of the constituent elements and of the processes and methods that made possible their utilization in man's most annihilatory invention.

We may not be able to prove to our satisfaction that every law of nature or principle or form of energy, once it is detected and utilized by science, thereafter becomes integral of the eternal mind of humanity; and certainly, no government of a nation has ever promulgated its decree in attempted abolition or limitation of any contribution of mind to human knowledge, except only as tyranny has repressed liberty or intolerant religious authority has sought to control belief or to impose its conception of the Divine Will.

The power in reserve of nations to destroy is a surest guaranty against the violence of aggression and for the maintenance of peace. If

atomic fission is in fact the ultimate weapon of global war and if all nations will not unite for its control, then such nations as will cooperate must combine to use the force of its violence and power against the outlaw nation. The history of mankind records no nation that voluntarily has surrendered superior arms or improved mechanisms of war either in appeasement of war threats or in the hope of a treaty of peace.

The three nations which have revealed to science this insight into the creation and structure of atomic energy and have evolved for humanity the age-sought universal instrumentality that in the certainty of its destroying power may coerce to peace the world's outlaw nation, must never forget the great responsibility to world peace and welfare their great achievement now casts upon the wisdom and justice of their instant decision in world affairs.

Chapter Five

JUSTICE RECONCILES CONFLICTS

Present Conflict Not Between Industrialism and Nationalism:

OUT OF THE ETERNAL CONFLICT of human life between the mind of man and his animal nature has come man's self-discipline in modification and mastery of his selfish survivals, the restraint by the group of the rebellious and anti-social individual and, finally, the government of society, as individuals or groups, in the subjection of the outlaw to the security of order and the rule of justice under law.

The nature of the conflicts reflect the political and economic conditions of man's development and change with his social and cultural life, but they always grow out of the desires, purposes and aspirations activated by his then dominant interests, and finally, are determined by and through the nature and administration of his kind of justice.

If not inane, it certainly gives no informative conception of the nature of instant conflicting opposites or contrasting struggles or competitions to assume that the "real conflict of the age is between industrialism and nationalism." Industrialism is the production of consumable things. But nationalism is the material form or structure through which the state functions as a mechanism of government.

Can the mind conceive in its search for justice of any aspects of antagonism or conflict between things which in economy of production are made for use or consumption and a nation under whose government they are made? All nations in the development of civilization have been zealous to aid in doing the work of its people and neither their economy nor industry can be opposed, or any way contrary to, the nation as the unit of organized government—except only as a Marxist or totalitarian autocracy

may seek to seize the government of the state and make the people slaves of its regimented industry.

Certainly, this assumed conflict between industrialism and nationalism which is avowed to be the conflict of the age is not meant the never ending struggle between the individual and the state; between the free enterprise of personal initiative and the regimentation of statism; between the liberalism that gives to every man the freedom to be a part of his government, in realization of his personality and the totalitarianism that subjects all to an autocracy, which in usurpation of the power of the state seeks the satisfactions of its interests to the abasement of the individual and the extinction of his personality.

When an anatomist of peace assumes the one vital issue is nationalism as against industrialism and avows the "failure of religion and of capitalism" is due to nationalism and that it is also the sole cause of war, because "wars always take place * * * whenever * * * nonintegrated social units of equal sovereignty come into contact," we may make three observations.

His thesis is that (1) contact alone of social units of unrestrained sovereign power, political, economic or religious, leads to or is the cause of war, destroys private enterprise and thwarts the development of religion; (2) he condemns the nation-state as the root evil to be extirpated and appraises industrialism as good, because international workers in control of universal governmental structure produce and distribute consumable things; and (3) he ignores human interests as the determinants of world destiny.

Nationalism, Individualism and Christianity:

CAPITALISM STILL CONTINUES as the sole universal system that has supplied man's material needs; and only minds that seek the complete socialization of governments or community production for common consumption will be inclined to accept the assumption that the nation-state alone has caused a complete breakdown of capitalism with attendant loss of individual enterprise. Confiscatory taxation conceived in redistribution of the national wealth, the alarming increase of bureaucracy to meet the demands

of emergency, but now planned for doubtful social welfare and dangerous economic experiments, the spending of funds in astronomical figures by the government for the maintenance of an increasing useless army of civil workers in industry or its supervisory control—all tend to discourage private initiative and free enterprise in industry and trade.

But the real reason for this destroying of human ambition is not found alone in the structural form of man's government. It is rather because basic life interests of individuals and groups are in conflict and contend for economic supremacy through struggles of power politics for the mastery of that government—whether world or national—which dominates industry.

The individual, soon and to the full realizes that the vital issue of survival in economy, as in politics, is between *himself*, who wants to contribute to the public opinion that governs him and to share his initiative and enterprise in free industry, and *statism* which uses the sovereign power of the dominant governmental unit for the regimentation of industry and the subjugation of the individual to its totalitarian power.

There are many who, impressed with the pragmatic real significance of the Christ teachings, may regret their too slow acceptance by mankind and their limited decisive power in world affairs; but few of us in sober reflection really believe Christianity has failed either the divine mission of its archetype or the zeal of its consecrated ministers, who in apostolic succession for two thousand years, have carried its message to the lowly. Not many will admit that religions in all lands, with their millions of votaries, loyal and devoted to their mother-taught creeds or rituals, have been impaired or their development or diffusion to any degree has been thwarted by the nation-state, whose interests are integral of religion, but in function separate.

Industrial Collectivism Means Totalitarianism:

BOTH THE EXPONENT OF PRIVATE PROPERTY in his extreme espousal of individualism and the collectivist with his radical demand for confiscation of private wealth and income for communal consumption, avow the need

of and contend for a strong central government of multiple functions and innumerable bureaus, totalitarian in form and autocratic in power.

It is idle and obviously in bad faith for the Marxist to acclaim his devotion to democracy and to declare its principles as essential to the freedom of the individual for which he pretends to strive. His real purpose is a government that not only submerges but crushes the individual in collective action. The desideratum of his philosophy is a regimentation that must not only emasculate the power but destroy the great middle class of trained and disciplined thinkers, workers and doers; and ultimately give dictatorial power exclusively to the hand and muscle workers, solely because they are of greatest number. So also there are those extreme individualists in present control of capitalistic production who are neither frank nor fair in their disavowal of a purpose to dominate a strong autocratic government for the conservation of the institutions of private property and free contract.

The vital issue dividing mankind at this instant is no longer religious, that was fought to toleration; nor is it alone political, that is solved in equality of representation; nor since the plenty of machine production, is it solely economic. But rather, it is the degree and kind of understanding among men, which will make certain such representation in their self-determined governance as will assure the just distribution of human satisfactions.

Representative democracy is now imperilled in this conflict for power between the forces of individual property and Marxist collectivism. The continuance of this struggle without compromise or conciliation inevitably must lead to group dictatorship with the consequent elimination of the individual as the unit of influence and the ultimate loss of his power.

Justice and Compromise of Industrial Conflicts:

THE PRINCIPLE OF COMPROMISE, however, has influenced and guided England and thus far the United States in their approach to the solution of this momentous problem. Compromise does not imply expedients should be adopted to the abandonment of right principles and ideal purposes.

But it does mean that while a far-seeing and striving statesmanship must have its foundation principles of right and its sublimated ideals; it must also evolve its human policies for a human world, devise its workable plans and execute them in meeting present practical solutions by instant means often deplored, sometimes even abhorred, and warranted only in the conviction of their necessity to the ultimate realization of the envisioned ideals.

Lincoln hated slavery, abhorred war and always welcomed compromise to prevent or to end war. When, however, war came, his sagacity diverted minds from the issue of slavery to the necessity of saving the Union; and he delayed the Emancipation Proclamation until both the preservation of the union and the abolition of slavery were reasonably certain, and then both became his everlasting contributions to human liberty.

All Western nations, except Russia and the puppet nations subdued to its will now have faith in the institution of private property and the motive of profit, whether their governments be dictatorial or democratic. As in Lincoln's day, the conflict between human freedom and slavery was irrepressible, so now the struggle between individualism and Marxism must be solved either by the resurgence of the submerged animal selfishness and combativeness in man, with its inevitable sporadic violences and ultimate arbitrament of class war, or by an enlightened self-interest in compromise restraining the overreachings of each—to the end that every successive understanding shall make the state less communistic to the individualist and less individualistic to the communist, and keep in balance and practical co-ordination both individual enterprise and communal welfare.

It requires no gift of prophecy to envisage the future of representative democracy as choice is made of either conflict or compromise as the method of solution. Let either individualism or Marxism alone prevail, or let our laws regulatory of the relations between capital and labor continue on the assumption of self-aggrandizement and irreconcilable conflict, or let the great body of the consuming public remain apathetic—and a government dominated by one or several, as representative of either a capitalistic or Marxist group, inevitably will rule a supine people. Or conversely, in their

desire for order and security the great mass of people exhausted and corrupted by never-ending strife and conflict will abandon the proud heritage of self-government because unequal to the effort of exercising the privilege.

Chapter Six

CONCILIATION OF CONFLICTS UNDER ORGANIZATION OF NATIONS AND ITS PRESERVATION

Universal Interests of Mankind:

THE (1) UNIVERSAL RELIGIOUS INTERESTS of Western cultures as directed by three hierarchies in sequence of their evolution are Orthodox Judaism, Roman Catholic and Protestant. The expansion of a nation into world empire, a united organization of sovereign nations and one sovereign world parliament are (2) the present concepts of universalism in politics and government. State production for community consumption under international Marxism and individual production under capitalism in international trade are (3) the conflicting interests and ideologies that now contend for supremacy in world economy. (4) The world educational interests have reflected always the universality of science to improve world conditions and human relations, but the demonstration of atomic energy as the certain force for devastating civilization makes its control the primary concern of all human interests—for it is the ultimate sanction that assures the order of society under universal law.

These universal interests affect the emergent evolution of one world order governed by law as ordained by a universal organization and enforced by an irresistible sanction. The human mind always has overcome the limitations of the body and its material surroundings, but the processes which determine man's interests and evaluate their utility are conditioned by both an internal and external environment which circumscribes his mind horizon.

For the truth of Kant persists and we never see things or discern relations as such, but only as our senses, aided by mechanical tools, convey to our minds an image of the things or impression of the relation or meaning of the idea. Thus, diversities of civilization result, levels of mind and moral development vary in individuals, races and nations, with consequent differences in religion, politics and government and contrasts in concepts of freedom and justice as the foundations of reality.

These diversities and opposites disclose the necessity of man's constant effort to avert the natural tendency to confusion and anarchy; and again is made clear the real purpose of life to be the conciliation of variant experiences and conflicting interests. This harmonizing function of justice can bring individuals and nations to the understandings that make for order alone through man's rational and moral nature. The uplifting power of the dynamic mind has failed man only when in impatience of injustice or in exuberance of hope he prematurely has sought relief against wrongs or in apathy of despair or inertia or indifference he has been unable to meet the responsibilities or unwilling to assume the burden of directing his own destiny.

We are here again admonished that the instant is the most momentous crisis in the rise and fall of the cultures of civilization, because global and mankind's utter helplessness against atomic energy. The world nations, in their determination to preserve universal order against the outlaw, must be warned that they dare not now imperil the foundations of their security and justice by the too soon abnegation of their sovereign power in oversanguine zeal to give a world government to too great masses of peoples, who have no desire for it, who are unprepared to meet its responsibilities and who are unresponsive to its potential goods and indifferent to the chaos so radical and hazardous a change in world affairs invites.

United Nations Must Conciliate Universal Conflicts:

THE ALLIED NATIONS OF THE SECQND WORLD WAR have been in earnest conference since, following the Axis unconditional surrender, the Atlantic Charter was promulgated and the United Nations was organized. But a singular fate made the victors, allies; and even stranger destiny, has destroyed all world dictators, except only Stalin and Franco. Hitler's be-

trayal and blundering invasion of Russia and Churchill's wisest of human decisions alone made inevitable this most fortuitous alliance of nations and decisive victory of arms.

The oldest parliamentary governments and most highly mechanized nations of free enterprise, and the most powerful of totalitarian states and first of Marxist cosmopolitan economy now constitute a world organization and, as such, involve the one issue vital to our civilization—whether nations and ideologies so opposite can in conciliation so appease their respective aspirations and purposes as to give the assurance of peace to such nations, to their peoples' happiness and welfare, and to the world an abiding security against an outlaw group or nation.

America and England must not repeat their futile effort to turn back the hands of destiny's clock as when at Versailles, in over-sanguine faith in world democracy, they attempted to restore tribal rule as representative republics in the Balkan states. The world representative democracies cannot now abandon the scientists' contribution to human knowledge decisive of man's destiny. They dare not destroy the weapon of atomic fission as the sure sanction of order under law against all possible outlawry until at least every potential outlaw nation, by world power in reserve or actually used, has been reduced to the certainty of impotence against the will and to the security, order and peace of all nations in world organization.

The Western free nations in war welcomed, and in peace now seek, the cooperation of Russia in control of world order under the sure sanctions against the outlaw nation. All of the Big Five nations have no choice but to submit to a qualified veto and every of them must now be subjected to the penalty of annihilation, if in rebellion to the constitutional decrees of the United Nations, it be adjudged an outlaw. Nazi Germany would not be appeased and became the crushed outlaw of its rapacious totalitarianism. The ending of the German nation will be the fate of any nation that opposes its will against the overwhelming power of world sovereignty as now vested in the United Nations Organization; but at the terrifying cost of the most appalling cataclysm that has ever overwhelmed man.

The time may sooner come than some now fear when Russia must be made to know the destiny of the world and her fate lie alone in her ultimate decision—for the free men of Western democracies are determined to remain free to think and work in free enterprise, for self-realization, personal dignity and the common weal; and for such ends propose to use every instrumentality their minds have given to human science.

They cannot do otherwise, since it is the decree of the Ruler of all things and men that the contributions of the mind of man to his development, once evolved, can neither be recalled nor destroyed and always have been for the betterment of individuals and nations that want to be free, tolerant and just.

Nations may not talk of appeasing an outlaw nation, nor dare they now demand their rights as nations under what they assert to be the laws of either nations or of nature, for the very existence and power of their world organization against outlawry is the vital issue that confronts civilization. There is only one way mankind can preserve its humanity and save itself from the final atomic warfare which forever will drive from the minds of men the threat of outlawry as the ultimate achievement of justice.

All of the dominant nations, with bold words in open session, must now avow the determination of the United Organization to be ruled by universal law by it decreed by vote of less than all; and to the consummation of this end of justice, every of them must renounce or limit by interpretation the right of veto so that no nation shall use it to promote its own interests but all alike shall be subject to the sanction of atomic destruction against the outlaw nation that would employ the veto in self-aggrandizement. For there can be no United Nations of power with reservation of an absolute veto, nor hope of world order under universal law without the organization of nations, with its awful sanction, formed not merely to seek peace, but to promote justice by the establishment of a world government with institutions and powers adequate to restrain the outlaw individual or nation.

Preservation of the Organization Though Russia Refuses to Co-ordinate: WE SHOULD HOPE RUSSIA will give up or modify her affronting use of the veto. The United Nations' Charter dare not be abandoned, whatever the eventuality or the motives of Russia's insistence upon the veto—for therein lies the only hope of world conciliation. In order to assure the preservation of the Organization though Russia remains recalcitrant, it is not necessary, however for humanity to assume Russia's fear of military and economic encirclement is feigned to conceal either her asserted destiny of world dominion or zeal to make universal her ideology of a class autocracy to regiment world industry through violence.

The Charter changed in fundamental aspects the world Organization as conceived by the Dumbarton Oakes plan. It created more than a world structure of sovereign states with principles definitive of their relations as political units in transition from war to peace; and it ordained the first world union for the control of all affairs that grow out of the dominant interests of mankind as they affect relations and institutions of governance, economy and culture for the security and welfare of humanity. A plan so stupendous in conception of world order must have grounded its foundations deep in the conviction that it could function only in universal justice determined by concessions of every constituent and the over-reaching of none.

Any of the Big Five may use its veto in conceived defense of its existence, and only the arbitrament of war can determine its real purpose; but no nation, without being condemned as an outlaw, may in self-aggrandizement, assert its veto in that enlarged segment which affects the dominant interests of humanity within the jurisdiction of the world organization.

So long as any of the Big Five nations refuses to restrict its power of veto, both the Organization and the separate nations are without choice. Every nation must maintain its full power, whatever the destructive force of its arms; and the Organization must function to enforce its sanctions against the outlaw nation, and continue in justice to control the dominant interests of mankind entrusted by the Charter to its protection.

The power of the Organization, moreover, must increase as through the years it reconciles the dominant material life interests coincident with the nations' delegating to it segments of their sovereignty, as its decrees attain progressively higher levels of universal justice. And so the aspiration for a world parliamentary federation grows to ultimate realization with the lessening of international tensions of trade and economy, the diminution of racial and religious intolerances and the decreasing appeal of nationalism.

The basic wisdom of the Nations Organization is that it deals with nations and can enforce its decrees, for the first time in human history, against the outlaw nation with the irresistible sanction of force. One of the most momentous judgments of man is now in the making for the ultimate decision of the people of Russia—since all the other of the Five Nations in present mastery of world affairs are fixed in loyalty to freedom of thought and enterprise.

If the Russian autocracy can prevent an army insurrection and suppress all aspirations of the Russian people for larger individual freedom, and if the government of Stalin, in fear of encirclement or in pride of nationalism or in over violent evangelism of international communism as of a religious dogma, can so continue to dominate Russia—then indeed the veto has ceased to be the instrumentality of self-preservation and is become the weapon of a nation's aggrandizement to the betrayal of the purposes of universal justice which alone gave to the World Organization an enduring foundation.

Defense of Free Government and Enterprise Against Marxism:

No GREATER DISERVICE may be done to universal justice as the aspiration of world civilization than the contentions: It is unwise to modify or abolish the veto without abandoning the Organization with instant substitution of a world parliamentary government; and that there is no relation between the use of the veto and the conflicts between Marxism and individual initiative.

The obvious fact that all mind aspirations and world material interests are now forming in irrepressible conflict between the two ideologies of Russian atheism in religion, class totalitarianism in government and statism in economy and the Anglo-American representative democracy in a free state and enterprise and of faith in God admonishes of the instant peril.

An ideology of any concepts of human polity by party name cannot be outlawed. For neither dissent can be controlled nor conformity be compelled, nor intent nor either avowal of pacific ideas or mere membership in an association, without violence to propagate them, be made a crime. But a government, whether ruled by force of arms or the opinion of free men, can exist only so long as it uses its power to repress the violences of insurrection or rebellion. The individual outlaw should not seek for rights under any higher law or under a constitution of the government his overt acts of violence would overthrow.

The problem then that confronts free governments is neither the wisdom nor expediency of outlawing a political party; but rather, the vital issue involves solely the preservation of a government that saves for free citizens the principles and methods of democracy and ways of life by them deemed essential to their self-realization.

Thus arises the practical question, fundamental in the solution of just governance, as to whether acts in concert of violence intended to destroy the existing republican system of government can be so defined as to make clear the purpose of that government to defend itself against a group of outlaws banded together to overthrow it.

No question of constitutional power of such government or of rights of such outlaws, nor issue of policy is here involved; and the suggestion of a distinction between a crime committed and an idea avowed becomes unapt in answering the controlling inquiry as to the pragmatic effectiveness of the definition of a conspiracy to destroy by force of violence an existing free government.

The imminent peril to the security of representative democracy and individual enterprise is the conspiracy of individual minds acting with a

common purpose to overthrow by violent means such instant form of government. This is what is denounced as a crime, and not membership in any party; for the Court in the Bridges and Schneiderman cases has held mere affiliation is not conclusive proof of approval of its principles.

Since, however, the menace of Marxism lies in its international aspects of preferential loyalty to another nation and of the use of force to the destruction of nationalism, the sovereign power of free nations in self-preservation by statute may and should enact: (a) That party membership is presumptive evidence of approval of the doctrines as formally adopted in its declaration of principles; e. g., the achievement of its ultimate ends by force of violence and of loyalty to an international group owing preferential allegiance to another nation; (b) that the felony of subversive disloyalty in peace or of the capital crime of treason in war results when individuals act in concert or conspire to advocate or to use force to overthrow the existing republican form of government; and (c) that membership in an international party pledged to violence and tied by primary loyalty to another nation is presumptive evidence of criminal intent.

War can be more than the patriot's prudential choice of human values and may be more than the ultimate means for achieving the aspirations of minds of good will for justice; nay, it is more than a mere deliverance from the worse ills that evil seekers for power would project on humanity in consummation of their war aims for plunder or the propaganda of a religious, political or economic creed. All of these are vital aspects and the inevitable effects that stem from the never-ending purpose of civilization to crush the outlaws' intermittent and sporadic challenges to man's eternal aspirations for the freedoms and justice by him won with labors of pain, that do not end with mankind's final arbitrament of arms. Only the sanctions of atomic devastation can make certain the destroying of outlaw individuals or nations, and so assure the preservation of human freedom and justice.

America and the British Commonwealth as the leaders of the free governments of man and the hierarchies of all religions as seekers of the

universal rule of the God of righteousness must now bear the heaviest burden world civilization has ever placed upon the loyalties or faiths of any peoples. The fate of mankind challenges these nations to stand armed and world religions to remain steadfast and unyielding in defense of the human freedoms and everlasting things the Nations Organization is ordained to preserve—understanding, purpose and conciliation as the foundations of universal order, tolerance and justice under law and for humanitarianism.